Supreme Court, U.S.
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No. 03-1174 FEB 17 2004

IN THE

Supreme Court of the United States

MICHELLE NORTON and JOHN NORTON, JR.,

Petitioners,

v.

DEBORAH HALL
COUNTY OF CUMBERLAND
CUMBERLAND COUNTY SHERIFF'S DEPARTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MAINE SUPREME JUDICIAL COURT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether an interpretation of discretionary function immunity under the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101-8118 (2003) ("MTCA"), that leaves the Petitioners without just compensation or a post-deprivation remedy for the tragic and unnecessary loss of their sons and their property is an impermissible unconstitutional taking of private property under the Fifth and Fourteenth Amendments of the United States Constitution and the Court's decisions in *Parratt v. Taylor,* 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), and *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

2. Whether a deputy sheriff violates substantive due process under 42 U.S.C. § 1983 by causing death through "deliberate or reckless indifference" to life in a situation where the decision to initiate and maintain an emergency response was not the instantaneous, split-second decision protected under the higher "shocking-to-the-conscience" standard in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

3. Whether the County Respondents should be held liable for violating Petitioners' substantive due process rights by their deliberate indifference to training, supervision, and discipline needs in allowing a deputy sheriff to operate an emergency vehicle when the Respondents knew or should of known of the deputy sheriff's tendency for dangerous driving at high speeds, *regardless* of whether deputy sheriff is found to have violated Petitioners' constitutional rights.

4. Whether, given the material facts in dispute, Petitioners' substantive due process claims against the Respondents must be decided by a jury trial.

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Appendix I — Excerpted Respondents' Reply Memorandum Of Law Motion In Support Of Motion To Dismiss By Cumberland County And Cumberland County's Sheriff's Department And Incorporated Memorandum Of Law Dated September 20, 2000 ..... 48a

Two teenagers, John A. Norton III and Matthew C. Norton, were killed, and their mother, Petitioner Michelle Norton, was injured, when a deputy sheriff responded to an alleged emergency at such an excessive speed and in such a reckless manner that she did not even see the Norton's vehicle prior to slamming into it. The Majority of the Maine Supreme Judicial Court interpreted the discretionary function immunity provisions of the MTCA in such a way that resulted in the Petitioners not being entitled to any, much less just, compensation for the grievous loss of their sons, Mrs. Norton's injuries, or for the destruction of the Nortons' property. The Majority also summarily rejected the Petitioners' substantive due process claims and never even addressed Petitioners' unconstitutional taking argument.

The Court should grant the writ because this case squarely presents the constitutional issue noted, but not resolved, in a high-speed pursuit case, *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998): the constitutionality of taking property in order to accomplish a legitimate governmental objective without providing just compensation or a post-deprivation remedy for such loss in a situation where alleged sovereign immunity is involved.

In addition, the Court should grant the writ to clarify two important questions: namely, whether the "deliberate indifference" standard for substantive due process violations under 42 U.S.C. § 1983 still exists where individual police conduct is not based on split-second, reflex decisions (as were present in the *County of Sacramento v. Lewis* case) and whether governmental entities can be held liable for their unconstitutional "deliberate indifference" to the training, supervision, and disciplinary needs of their employees, *irrespective* of whether employee conduct is found to violate the Constitution.

Finally, this Court should agree to take this matter up, where the legacy of *County of Sacramento v. Lewis* has resulted in inappropriate and overbroad application and summary disposition in cases where a jury should be allowed to decide issues of fact in dispute.

OPINIONS AND JUDGMENTS BELOW

The unreported opinion of the Maine Superior Court dismissing Petitioners' constitutional and civil rights claims against the County Respondents was entered into on December 28, 2000. This opinion is reprinted in the Appendix at 33a.

The unreported opinion of the Maine Superior Court dismissing the rest of Petitioners' claims against all Respondents was entered into on July 3, 2002. This opinion is reprinted in the Appendix at 22a.

The opinion of the Maine Supreme Judicial Court and the dissent thereto were entered on September 30, 2003 and are reported at 834 A.2d 928 (2003). The opinion is reprinted in the Appendix at 1a.

The Maine Supreme Judicial Court's order denying Petitioners Michelle and John Norton Jr.'s request for reconsideration was entered on November 19, 2003. This order is reprinted in the Appendix at 35a.

JURISDICTIONAL STATEMENT

Jurisdiction is conferred on this Court by 28 U.S.C. § 1257, which provides that final judgments rendered by the highest court of a State in which a decision could be had may be reviewed by the Supreme Court by writ of certiorari "where the validity of a statute of any State is drawn into question on the ground of its being repugnant to the Constitution." The petition for certiorari is timely filed with this Court from the denial of the Petitioners' motion for rehearing on November 19, 2003.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Maine Tort Claims Act ("MTCA") is codified at 14 M.R.S.A. §§ 8101-8118 (2003) and relevant portions are reproduced in the Appendix at 37a – 39a.

The Maine Emergency and Auxiliary Lights; Sirens; Privileges Act ("Emergency Response Act") is codified at 29-A M.R.S.A. § 2054. Selective portions are reproduced in the Appendix at 39a – 40a.

The Fifth Amendment to the United States Constitution is reproduced in the Appendix at 36a.

The Fourteenth Amendment to the United States Constitution is reproduced in the Appendix at 36a.

Section 1 of 42 U.S.C. § 1983 is reproduced in the Appendix at 36a – 37a.

STATEMENT OF FACTS

1. On the evening of July 8, 1998, Respondent Deborah Hall, then a full-time deputy with the Cumberland County Sheriff's Department, received a radio dispatch call to respond to a home where a six-year old child with an attention disorder was reported out-of-control. App. at 2a; 24a.

2. There was no report of any injuries, only a behavioral problem, thus factual issues exist as to whether Deputy Hall had any reasonable basis for believing any such emergency existed. App at 2a; 24a.; Appendix to the Maine Supreme Judicial Court On Appeal from The Superior Court (herein "Record") at 101; 170-171.

3. On her own initiative, Respondent Hall determined that the dispatch required an emergency response, despite the fact that at no time during the original dispatch or thereafter did the

Respondent Cumberland County Sheriff's Department advise Respondent Hall that it should be treated as such. App. at 2a; 24a-25a.

4. Traveling on a busy Route 302 near a popular summer resort area where many people frequent the beach, even at night, Respondent Hall was observed by witnesses to be passing vehicles at extremely reckless speeds up to 50 mph over the posted speed limits, including approximately up to 86 mph in 30 and 55 mph zones. App. at 2a; 25a-26a. Record at 180-181.

5. At least two minutes before the crash, Defendant Hall was advised that there was no emergency and that her supervisor was en route to the scene. Record at 103; 179.

6. After traveling four miles in three minutes, Respondent Hall pulled into the left side lane, passed four cars that had properly slowed down and were waiting in line, the last two with their left signal turn lights on, and collided with the Petitioners' car. At the time, John A. Norton III was making a left-handed turn with his left turn signal properly activated onto the road where the Petitioners lived. App. at 2a; 25a-26a. Record at 91;104; 180; 184; 257.

7. The Petitioners' sons, John A. Norton III and Matthew C. Norton, aged 18 and 15, died as a result of the collision. Petitioner Michelle Norton, who was a passenger in the car, was injured. The Norton vehicle was totaled. App. at 2a; 26a.

8. At all times, John A. Norton III was exercising due care in the operation of the Norton vehicle. Record at 182.

9. In contrast, at the time of the accident, Respondent Hall was going at least 86 mph in a 55 mph zone, despite the fact that the Cumberland County Sheriff's Office Field Service Manual, which Respondent Hall admitted that she was required to read and know, specifically *prohibited* traveling more than

20 mph over the speed limit during an "emergency" response. App. at 26a; 28a. Record at 60; 108-109; 131-132; 180-181.

10. Respondent Hall did not have her warning siren on during the accident, despite the fact that her training had taught her that she had no discretion to turn off her siren when near apparent traffic, an intersection, or traffic signal of some sort. App. at 28a, n.7; 29a, n.8. Record at 91; 180-182; 183. Moreover, under Maine law, an emergency vehicle *must* have its siren activated, if necessary to provide warning of approach, if it is exceeding speed limits or violating other normal rules of the road. 29-A M.R.S.A. § 2054; Record at 183; 228-229; 257. The Cumberland County Sheriff's Department policy is that no police officer has the discretion to violate Maine law. Record at 183; 275.

11. Respondent Hall admitted that she had not made any conscious decision to pass the Norton vehicle, but instead was going so fast that she never saw the Norton vehicle, and only saw the Nortons' left turn signal a split second prior to the impact. Record at 207.

12. Post-accident investigation also revealed that the Respondent Cumberland County Sheriff's Department had allowed Respondent Hall to operate motor vehicles under color of law, despite her ongoing substandard performance on Emergency Vehicle Operation Compliance testing, including self-reported "tunnel vision" while operating vehicles at high speeds. App. at 45a. In fact, in April 1998, only three months before the accident giving rise to this lawsuit, Respondent Hall was involved in an accident also caused by her excessive speed, lack of proper judgment, and driving skills in which she totaled her cruiser. App. at 45a; Record at 210; 221.

13. Yet, the Respondent County did little to investigate the April, 1998 accident, took no disciplinary actions against

Respondent Hall, failed to take additional steps to train Respondent Hall in the operation of emergency vehicles and allowed Hall to continue operating emergency vehicles in a negligent and reckless manner. App. 45a; Record at 210, 221.

14. The Respondent County's own interpretation of the MTCA and the Maine Emergency Response Act did not release the operator or the County from civil liability for failure to use reasonable care in an emergency situation. Record at 71.

15. On June 28, 2000, Petitioners filed negligence, wrongful death, and civil rights claims on their own behalf and behalf of the estates of their sons, seeking damages related to the loss of their children, Mrs. Norton's injuries, and their property damage as the result of Deputy Hall's, the County of Cumberland's, and the Cumberland County Sheriff's Department's negligent acts. Record at 16-29.

16. On December 28, 2000, in response to the summary judgment motions of the Respondents Cumberland County and the Cumberland County Sheriff's Department, the Maine Superior Court ruled that the Petitioners did not meet the Fourteenth Amendment "shocks-the-conscience" standard against the County Respondents because Petitioners "did not suggest that [Respondent] *Hall* intended to harm" the Petitioners. App. at 33a (emphasis added). The Superior Court additionally summarily rejected all of Petitioners' civil rights claims against the County Respondents, stating that the existence of an unconstitutional custom, policy, or practice was not shown. App. at 34a. In doing so, the Superior Court ignored Petitioners' argument that the County Respondents *caused* the accident by their deliberate indifference in doing little to investigate, discipline, or provide additional training to Respondent Hall despite her totaling a police car in an excessive speed accident three months before the fatal accident that destroyed Petitioners' family and despite knowledge of difficulties Respondent Hall

had with Emergency Vehicle Operation Course ("EVOC") testing. App. at 45a. Petitioners' unconstitutional taking claims against the County Respondents were not addressed.[1]

17. On July 3, 2002, in response to the summary judgment motions of all Respondents, the Maine Superior Court ruled that the Petitioners' suit was barred by the discretionary function immunity provisions of the MTCA and that Petitioners' constitutional claims and substantive due process claims against Respondent Hall were precluded because of qualified immunity. App. at 27a-30a; 32a. The Maine Superior Court did not address Petitioners' unconstitutional taking claims.

18. The Petitioners appealed to the Maine Supreme Judicial Court contending that the threshold discretionary decision to respond to the alleged "emergency"[2] (the "whether" to respond) did not give Deputy Hall unfettered immunity to violate the rules of the road and to respond with excessive speed and reckless driving (the "how" to respond) in violation of the Maine Emergency Response Act. The Petitioners argued that such reading of the MTCA and Maine Emergency Response Act would effectively immunize police officers for their tortious conduct when they were allegedly acting in furtherance of a legitimate public interest. The Petitioners further argued that such a decision would leave victims of such tortious acts without just compensation for their losses. The Petitioners further

1. At this time the Superior Court also granted the Motions To Dismiss by the State of Maine, Maine Criminal Justice Academy, and Maine State Police (the "State Defendants"). Unreported Order of Superior Court Justice Delahanty dated December 28, 2000. The dismissal of the claims against these State actors is not challenged in this Petition.

2. As the call was for a "hyperactive six-year old," see App. at 2a; 24a; Record at 70-171, there is a question of fact as to whether there was any emergency, which would necessitate the excessive speeds driven by Respondent Hall.

contended that the Superior Court had applied the wrong "shocking the conscience" standard in evaluating Petitioners' Fourteenth Amendment claims against both Hall and the County entities, noting related to Respondent Hall, that she was not involved in a split-second decision emergency response and had the time to reflect.

19. In its September 30, 2003 decision, the Majority of the Court held that the Petitioners' claims were barred by the discretionary function immunity under the MTCA. App. at 2a. The Majority did so notwithstanding the fact that there is no indication in either the plain language of the MTCA or later-enacted Emergency Response Act, which by its plain language seeks to limit emergency vehicle response discretion, that these two statutes could not be read in tandem to reasonably require police officers to use due care in responding to emergency situations. In addition, the Majority summarily rejected the Petitioners' § 1983 substantive due process contentions on the grounds that the Court's decision in *County of Sacramento v. Lewis* required a showing that Respondent Hall's conduct "shocks the conscience" and that Petitioners did not make such a showing. App. at 10a – 12a. The Majority did not address the Petitioners' unconstitutional taking argument.

20. As pointed out in the Dissent to the Maine Supreme Judicial Court's Decision, the Majority's reading of the MTCA in conjunction with the Maine Emergency Response Act, is not only contrary to the long-standing Maine common law principle that the discretionary choice to initiate and maintain an emergency response does not relieve government actors from the duty of exercising due care to prevent injury to themselves and others lawfully on the roads, but further is contrary to the interpretations of the similar discretionary function immunity provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 2671-

2680 ("FTCA"), and the interpretations of similar immunity and emergency statutes of other states that limit the discretion of governmental entities and officers in operating emergency response vehicles. *See* App. at 14a – 21a.

REASONS FOR GRANTING THE PETITION

The Maine Supreme Judicial Court's interpretation of the MTCA has resulted in Petitioners being left without any means of redress or just compensation for the tragic loss of their sons. The Maine Court's decision leaves such victims without just compensation or a post-deprivation remedy for their grievous losses. This deprivation is unconstitutional and must be remedied by this Court of last resort.

In addition, the Maine courts have erroneously applied the too high "shocking the conscience" test in determining that Petitioners did not state a claim against Respondent Hall or against the County Respondents under § 1983. In both instances, the appropriate standard of review should have been "deliberate indifference," where Respondent Hall had time to reflect, and where the County Respondents' deliberate indifference occurred well prior to the accident, when it continued to allow Respondent Hall to drive despite knowledge of her tendency for dangerous driving.

Similarly, the Majority erred in not allowing the jury to decide Petitioners' substantive due process claims against the Respondents.

I. THE MAINE SUPREME JUDICIAL COURT'S INTERPRETATION OF THE MTCA VIOLATES THE FEDERAL CONSTITUTIONAL MANDATE THAT INDIVIDUALS CANNOT BE DEPRIVED OF LIFE OR LIBERTY BY GOVERNMENT ENTITIES WITHOUT JUST COMPENSATION OR POST-DEPRIVATION REMEDIES FOR LOSSES.

One of the cornerstones of American constitutional jurisprudence is that an individual cannot be deprived of life or property interests at the hands of governmental entities without just compensation. U.S. Const. amend V; U.S. Const. amend XIV.

The "just compensation" taking argument is very different than the substantive due process claim considered by the Majority in the Maine Supreme Judicial Court's decision. As explained by the United States Supreme Court, the essence of a substantive due process claim is a determination that the conduct of the government employee is sufficiently egregious to state a due process violation. *County of Sacramento v. Lewis*, 523 U.S. 833, 840, 118 S. Ct. 1708, 1713, 140 L. Ed. 2d 1043, 1054 (1998).

In other words, in a typical due process case, the question is whether the government official's actions rise to the level of a "Constitutional tort." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397, 91 S. Ct. 1999, 2005, 29 L. Ed. 2d 619, 627 (U.S. 1971) (leading "Constitutional tort" case stating that "[t]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury" in allowing "Constitutional tort" claim for violation of Fourth Amendment rights).

By contrast, the "just compensation" claim focuses on the constitutionality of taking property in order to accomplish a

legitimate governmental objective without providing just compensation or a post-deprivation remedy for such loss. Under a just compensation argument, the "constitutional injury alleged . . . is not that property was taken, but that it was taken without just compensation. Had the [government entity] paid for the property or had an adequate post-deprivation remedy been available, [the plaintiffs] would have suffered no constitutional injury from the taking alone." *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 710, 119 S. Ct. 1624, 1639, 143 L. Ed. 2d 882, 905 (1999). There is no question that the decision of the Majority of the Maine Supreme Judicial Court results in the Petitioners being deprived of their causes of action and left with no alternative remedy or means of redress.

The Court tangentially addressed the issue of a potential lack of adequate post-deprivation remedy in the context of a high-speed chase in *County of Sacramento v. Lewis*, 523 U.S. 833, 840 n.4, 118 S. Ct. 1708, 1714 n.4, 140 L. Ed. 2d 1043, 1054 (1998). The respondents' son was killed when he fell off a motorcycle that was being chased by the police and was hit by the police vehicle. The issue before the Court was whether the respondent was deprived of his right to life in violation of substantive due process under a theory that a high speed chase was an abuse of executive power so clearly unjustified by any legitimate objective of law enforcement as to be barred by the Fourteenth Amendment. 523 U.S. at 840, 118 S. Ct. at 1713, 140 L. Ed. 2d at 1054. Relevant here is that the *County of Sacramento v. Lewis* Court specifically noted that:

> Respondents do *not* argue that they were denied due process of law by virtue of the fact that California's post-deprivation procedures and rules of immunity have effectively denied them an adequate opportunity to seek compensation for the state-occasioned deprivation of their son's life. We express

> no opinion here on the merits of such a claim, cf. *Albright v. Oliver,* 510 U.S. 266, 281-286, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) (Kennedy, J., concurring in judgment); *Parratt v. Taylor*, 451 U.S. 527, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), or on the adequacy of California's post-deprivation compensation scheme.

County of Sacramento v. Lewis, 523 U.S. at 840 n.4, 118 S. Ct. at 1714 n.4, 140 L. Ed. 2d at 1054 (emphasis added).

In contrast to *Lewis*, Petitioners raised the issue of whether the MTCA discretionary function immunity, as interpreted by the Maine courts, denies any adequate remedy or post-deprivation remedy before both the Maine Superior Court and the Maine Supreme Judicial Court. App. at 46a; 47a. This issue of "just compensation" must be addressed as the Majority of the Maine Supreme Judicial Court has determined that because the Respondents' actions that lead to the destruction of Petitioners' family were based on discretionary conduct in carrying out the legitimate governmental function of responding to an emergency, Respondents do not have to provide Petitioners with *any* compensation for their losses. This interpretation of the MTCA renders it unconstitutional on its face.

The Court's holding in *Parratt v. Taylor,* 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), illustrates the constitutional infirmity. In *Parratt,* the plaintiff claimed that his constitutional rights had been abridged when prison officials deprived him of a $23.00 hobby kit. 451 U.S. at 529, 101 S. Ct. at 1910, 68 L. Ed. 2d at 424. While the Court acknowledged that the State did not have the right to deprive the plaintiff of his property, they found that there had been no constitutional violation because the State had provided an adequate post-deprivation remedy. 51 U.S. at 544-45, 101 S. Ct. at 1917, 68 L. Ed. 2d at 434. *See also Fla. Prepaid Postsecondary Educ. Expense Bd. v.*

College Sav. Bank, 527 U.S. 627, 643, 119 S. Ct. 2199, 2208, 144 L. Ed. 2d 575, 590 (1999) ("only where the State provides no remedy, or only inadequate remedies, to injured patent owners for its infringement of their patent could a deprivation of property without due process result").

If the Constitution requires a state prisoner to be reimbursed for a lost hobby kit or a patent owner to be reimbursed when a State infringes the patent owner's rights, there can be no serious question that the Constitution also requires the State to provide a post-deprivation remedy to the Petitioners for their tragic loss, regardless of any alleged discretionary sovereign immunity. *See e.g. Albright v. Oliver*, 510 U.S. 266, 284, 127 L. Ed. 2d 114, 114 S. Ct. 807 (1994) ("precedents make clear that a state actor's random and unauthorized deprivation of [a constitutional] interest cannot be challenged under 42 U.S.C. § 1983 so long as the State provides an adequate post deprivation remedy"); *Hudson v. Palmer*, 468 U.S. 517, 535-36; 104 S. Ct. 3194, 3205, 82 L. Ed. 2d 393, 407 (1984) (not reaching *Parratt* issue where plaintiff did not show that sovereign immunity would bar lawsuit for intentional destruction of certain noncontraband personal property during shakedown search); *Lambert v. McFarland*, 612 F. Supp. 1252, 1268 (N.D. Ga. 1984) (where maintenance of a jail by a municipality is considered a "governmental function" and City would be immune from suit in performing the governmental function of maintaining the jail, Court could not conclude as a matter of law that adequate state remedies exist, thus denied defendants' motion for summary judgment on *Parratt* grounds); *Collier v. Springdale,* 733 F.2d 1311, 1317 (8th Cir. 1984) (unnecessary to decide whether sovereign immunity made state tort remedy inadequate under *Parratt* since plaintiff cited no cases for proposition that tort action for appropriation of or damage to private property for public use was barred by the Arkansas tort

immunity statute and plaintiff had civil "just compensation" remedy for taking).

For the above reasons, the Court should grant this petition to consider the unanswered question as to whether the MTCA, as interpreted by the Majority of the Maine Supreme Judicial Court, is unconstitutional under the Federal Constitution for failing to provide the Petitioners with the right to legal redress or an adequate post-deprivation remedy for their grievous losses.

II. THE MAINE COURTS DID NOT APPLY THE CORRECT STANDARD IN EVALUATING PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIMS.

A. The Proper Standard Against Which To Evaluate The Petitioners' § 1983 Claim Against Respondent Hall Is "Deliberate Indifference" And Not Conduct That "Shocks The Conscience."

The Majority of the Maine Supreme Judicial Court held that the Petitioners did not prove their contentions that Respondent Hall's conduct violated 42 U.S.C. § 1983, which requires that Petitioners be allowed a remedy for "the deprivation of any rights, privileges, or immunities secured by the Constitution" by any person acting under the color of law. 42 U.S.C. § 1983. In doing so, the Majority held that Respondent Hall's conduct did not deprive them of their substantive due process rights protected by the Fourteenth Amendment on the grounds that Petitioners did not demonstrate that Hall's conduct "shocks the conscience." App. at 11a. The Majority relied on this Court's decision in *County of Sacramento v. Lewis* in support of its contention that this was the correct standard. *Id. See also* App. at 32a. (Maine Superior Court denying Petitioners' substantive due process claims against Respondent Hall under same standard).

Petitioners respectfully contend that the Majority of the Maine Court expanded *County of Sacramento v. Lewis* to a breadth clearly beyond what the Court intended. In *Lewis,* the Court decided the specific issue of "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a *high-speed automobile chase aimed at apprehending a suspected offender." County of Sacramento v. Lewis,* 523 U.S. at 836. 140 L. Ed. 2d at 1051, 118 S. Ct. at 1711 (emphasis added). The rationale of *County of Sacramento v. Lewis* is that it applies to those extreme cases in which an official lacks the "time for reflection." *Id.* at 536 U.S. at 853-855, 140 L. Ed. 2d at 1062, 118 S. Ct. at 1720.

Surely the Court did not intend that this standard apply in any and all instances, where an officer operates a motor vehicle in an emergency response.

The *County of Sacramento v. Lewis* decision did not seek to establish a static test for substantive due process. Instead the Court merely noted that certain uniform principles do operate, namely that negligent conduct is "categorically beneath the threshold of constitutional due process" and that " behavior at the other end of the culpability spectrum" i.e., "conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level." 536 U.S. at 849, 140 L. Ed. 2d at 1059, 118 S. Ct. at 1718. "Whether the point of conscience-shocking is reached when injuries are produced with culpability falling within the middle range, following from something more than negligence, but less than intentional conduct, such as recklessness, is a matter for closer calls." *Id.*

As this Court noted in an earlier case on this subject:

> That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal

> sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial. In the application of such a concept, there is always the danger of falling into the habit of formulating the guarantee into a set of hard and fast rules the application of which in a given case may be to ignore the qualifying factors therein disclosed.

Bettes v. Brady, 316 U.S. 455, 462, 68 L. Ed. 2d 1595, 1602, 62 S. Ct. 1252, 1256 (1942).

The *County of Sacramento v. Lewis* court did not indicate that the "deliberate indifference" standard would no longer be sufficient to show unjustifiable governmental conduct, but just under the circumstances of the case, that a higher standard would apply. *Id.* In situations where the official has the opportunity to deliberate, the "deliberate indifference" standard still applies. *See County of Sacramento v. Lewis* at 536 U.S. at 853, 140 L. Ed. 2d at 1062, 118 S. Ct. at 1720. ("When such extended opportunities to do better are teamed with protracted failure to care, indifference is truly shocking.").

In other words, the alleged constitutional violation must still be viewed within the context in which it occurred. *See Cummings v. McIntire*, 271 F.3d 341, 345 (1st Cir. 2001). The "touchstone of due process" is still "the protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 41 L. Ed. 2d 935, 952, 94 S. Ct. 2963, 2971 (1973). It is the exercise of power without any reasonable justification in the service of a legitimate governmental objective that is forbidden. *Daniels v. Williams*, 474 U.S. 327, 331, 88 L. Ed. 2d 662, 669 106 S. Ct. 662, 665 (1986).

Here Respondent Hall's reckless and dangerous conduct, including reckless speeding without a siren in violation of the her employer's own *mandatory* policies and the

Maine Emergency Response Act, had *no* reasonable justification, particularly given the fact that, taken in the light most favorable to Petitioners on a summary judgment motion, she was not even responding to a valid emergency. *See Richards v. Town of Eliot*, 780 Me. 281, 289 (Me. 2001) (disputed facts to be construed in favor of party opposing summary judgment). As Respondent Hall was responding to a dispatch call involving a hyperactive 6-year-old child, without any information of criminal activity or even personal injury, and gathered more information en route, indicating that it was a non-emergency through additional dispatch calls, she had "opportunities to do better"[3] and repeatedly failed to do so. This is precisely the type of shocking indifference that the court has considered as actionable. As such, whether the standard of review is "shocks the conscience" or "deliberate indifference," her actions resulted in deprivation of the Petitioners' substantive due process rights.

B. Thus Whether Petitioners Have Established Substantive Due Process Violations Is A Question For The Jury.

In this case there is a material factual dispute about whether Defendant Hall was responding to any emergency, much less one that diminished her ability to deliberate. *See e.g.* Record at 163-166. Petitioners dispute as to whether Deputy Hall had any reasonable basis for believing any such emergency existed at all. Respondent Hall was not told that this was an emergency during the initial dispatch and was informed well prior to the accident that no personal injury was involved and that this call was just for a behavioral problem. *See e.g.* Record at 170; 171, 178-179; 185-187. Defendant Hall admits that her actions were not split-second, instinctual responses as found in the *County of Sacramento v. Lewis* case. *See e.g.*, Record at 63; Hall's

3. *County of Sacramento v. Lewis* at 536 U.S. at 853, 140 L. Ed. 2d at 1062, 118 S. Ct. at 1720.

Motion For Summary Judgment at 12 n.3. *Compare County of Sacramento v. Lewis,* 523 U.S. at 855,140 L. Ed. 2d at 1063, 118 S. Ct. at 1721 ("The [driver's] outrageous behavior was practically instantaneous and so was the [officer's] instinctive response."). Instead, Defendant Hall represented that her actions were "intentional" and were not "inadvertent, mistaken or coincidental." Hall's Memorandum of Law In Support of Motion For Summary Judgment dated December 11, 2001 at 12 n.3.[4] Unlike the officers in the high-speed chase cases, Defendant Hall had the opportunity to consider her actions, especially after she was informed no emergency existed. *See e.g.,* Record at 170; 171, 178-179; 185-187. Tragically for all involved, despite Defendant Hall's opportunity to deliberate, she proceeded in a shocking manner which evidenced a "deliberate indifference" to the dire consequences of her actions.[5]

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4. Respondent Hall states in her Motion that she made "intentional and deliberate (albeit immediate) decisions in terms of how to respond" and that all of her actions "were intentional." Hall's Memorandum of Law In Support of Motion For Summary Judgment dated December 11, 2001 at 12 n.3.

5. There is ample evidence from which to conclude that Defendant Hall's driving at the crowded intersection was so egregious that it satisfied the more stringent "shocks the conscience" standard.

For example, as one eyewitnesses testified at Respondent Hall's criminal trial: "[I]t was amazing how quickly because she was – it was in my mirror, the lights and then right by." *State of Maine v. Deborah Hall* Criminal Trial Transcript dated January 26, 2000 (hereinafter "Criminal Trial") Testimony of Phillip Testa at 41-42.

Another eyewitness' experience was similar:

> They [the blue lights] came up so quickly by the time I glanced at them they were right beside me in a split second. She went by me like I was stopped. . . . I didn't have time to do nothing, no. Went by this fast. At that instant I had

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As developed in the lower courts, the record shows that this crash did not occur as Defendant Hall was pulling out of the parking lot in response to the initial call. To the contrary, the Defendant drove four miles between the time of the radio dispatch and the collision. Record at 179; 181. During that time, she obtained more information, which should have caused her to abandon her emergency response. Specifically, the dispatch log shows that Defendant Hall was advised close to two minutes before the crash that there was no report of personal injury. Record at 103; 179. The record also shows that Defendant Hall knew that her supervisor was also en route to the scene. Record at 103. There is no evidence that the Defendant's supervisor could not have taken whatever police action was necessary upon arrival at the scene. Nor is there objective evidence that a few seconds of delay in reaching the scene would have made any meaningful difference.

This is not a situation in which prison officials are making and carrying out decisions regarding the use of force in the face of the immediate dangers associated with a prison uprising. *Whitley v. Albers,* 475 U.S. 312, 327, 89 L. Ed. 2d 251, 106 S. Ct. 1078 (1986) (applying shocking-the-consciousness standard). Instead in an analogous situation, the First Circuit recently held that the "shocks the conscience" standard is not applicable where, as here, there was a potential for the governmental official to deliberate about his course of action.

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> just happened to say to my brother-in-law this is ridiculous, this shouldn't happen.

Criminal Trial Testimony of Michael Libby at 60-61.

The driver immediately behind the Petitioners' vehicle testified on cross-examination that by "excessive" she meant "excessive for *any* vehicle" and that when the cruiser passed "it rocked the entire back of her car." Criminal Trial Testimony of Jennifer Saucier at 113-118.

Davies v. Rennie, 264 F.3d 86, 99-100 (1st Cir. 2001) (upholding verdict against mental health workers who could or should have deliberated before subduing patient).

In sum, the record below shows that Petitioners established that it was "practical" for Defendant Hall to engage in "actual deliberation" long before she caused any harm. *County of Sacramento v. Lewis* at 536 U.S. at 853, 140 L. Ed. 2d at 1062, 118 S. Ct. at 1720. As such, the determination of whether the Respondent's conduct arose to such a level as to be actionable under § 1983 is a question of fact for a jury. *See e.g., Mabe v. San Bernadino County*, 237 F.3d 1101, 1108 (9th Cir. 2001) (whether reasonable cause to believe "extingent circumstances" existed in 42 U.S.C. § 1983 case was question of fact for a jury to decide); *Wood v. Ostrander*, 879 F.2d 583, 588 n.4 (9th Cir. 1989) (reversing grant of summary judgment because defendant's conduct could be construed to be deliberately indifferent; "a jury presented with these facts might find Ostrander's conduct to have been 'deliberately indifferent,' 'reckless,' 'grossly negligent,' or merely 'negligent.'") (citing *Fargo v. City of San Juan Bautista*, 857 F.2d 638, 641 (9th Cir. 1988) ("When reasonable persons may disagree as to whether particular conduct constitutes negligence, gross negligence, or recklessness, the question is one of fact to be decided by the jury")).

C. Respondent Hall Is Not Entitled To Qualified Immunity Under The Facts.

A governmental official is only entitled to qualified immunity where the official or entity can prove that the official's actions were objectively reasonable and not in violation of any clearly established legal or constitutional rights. *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2739, 73 L. Ed. 2d 396, 410 (1982). In *Harlow*, the Court stated, "that government officials performing discretionary functions,

generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established *statutory* or constitutional rights of which a reasonable person would have known." *Id.* (emphasis added).

Defendant Hall's actions exceeded the Defendants' statutory authority.[6] She operated her vehicle at 86 mph, without a siren, while passing vehicles on the left, who had left turn signals activated. Record at 181. By any objective measure, Defendant Hall knew or should have known that her extraordinarily excessive speed without a siren endangered the health and safety of the public, including Petitioners' family. She knew or should have known that her actions violated State law.[7] 29-A M.R.S.A. § 2054 (2001).

Based on all of the above, Petitioner Hall is not entitled to qualified immunity. The Court should grant certification and remand to the Maine Supreme Judicial Court for reconsideration under the proper "deliberate indifference" standard and for a jury trial on the disputed facts.

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6. By arguing that Defendant Hall violated clear statutory law, the Plaintiffs do not mean to imply that there was insufficient existing case law from which a reasonable person would know that her actions also violated the Petitioners' Constitutional rights.

7. As explained by Petitioners to the lower courts, Respondent Hall cannot legitimately argue that she did not know that it was illegal to drive in the manner she did, since the *Cumberland County Sheriff's Department Field Services Manual* that she was operating under and required to read and know told her that she and the Respondent Sheriff's Department would be held liable for the consequences of her reckless driving. Record at 60; 108-109. This same manual provides a procedural order which imposes a restriction of driving no faster than 20 miles per hour above the posted speed limit in an emergency response. Record at 74; 180-181. *In addition,* she testified at her deposition that she knew that the Emergency Response Act required her to have both her lights and siren on when approaching traffic. Record at 271.

D. Petitioners' Allegations State a Claim Against The County Respondents, For Lack of Training.

The Petitioners claimed that the Respondents Cumberland County and the Cumberland County Sheriff's Department, not merely Respondent Hall, violated the substantive due process rights afforded them by the Constitution. App. at 45a. This issue, however, was not addressed by the Maine Supreme Judicial Court, even though the Supreme Judicial Court acknowledged that Petitioners claimed that "the *defendants* were not entitled to qualified immunity." App. at 10a (emphasis added). Petitioners respectfully suggest that the issue of whether the County Respondents violated Petitioners' due process rights may have been ignored by the Maine courts upon a mistaken belief that if Respondent Hall was found not to have violated any constitutional standards, the County Respondents could not be held liable. *See* App. 11a (Maine Supreme Judicial Court stating "We agree with the Superior Court that this argument fails because the [Petitioners] did not demonstrate that *Hall's* conduct 'shocks the conscience.'") (emphasis added). *See also* App. at 33a (Superior Court decision rejecting Petitioners' § 1983 claims against the *County Respondents* on grounds that Respondent Hall's conduct did not meet the Fourteenth Amendment "shocks the conscience" standard); App. at 45a-49a. (Petitioners' and County Respondents' Briefs at the Superior Court in which focus on whether Petitioners would need to show whether Respondent Hall violated Petitioners' substantive due process rights in order to have a failure to train claim).[8]

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8. The Superior Court also rejected Petitioners' claims on the grounds that no unconstitutional custom, policy, or practice was allegedly shown, contrary to the clear disputed facts related to Respondent Hall's

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In *City of Canton, Ohio v. Harris,* 489 U.S. 378, 380, 109 S. Ct. 1197, 1205-06, 103 L. Ed. 2d 412, 426-427 (1989), the Court recognized that under certain circumstances, a governmental entity may be liable under 42 U.S.C. § 1983 for its failure to train employees. Specifically, the Court held that the inadequacy of police training may serve as the basis for § 1983 liability where the failure to train amounts to "deliberate indifference" to the rights of persons with whom the police come into contact. *Id.*

In *County of Sacramento v. Lewis*, the Court cited *Canton* in *dicta* for the proposition that the Court employs "a deliberate indifference as a standard of culpability sufficient to identify a dereliction as reflective of municipal policy and to sustain a claim of municipal liability for failure to train an employee who causes harm by unconstitutional conduct for which he would be individually liable." 523 U.S. at 849 n.10, 118 S. Ct. at 1718 n.10, 140 L. Ed. 2d at 1060 n.10.

The issue in front of the Court in *Canton*, however, was whether the City was liable under 42 U.S.C. § 1983 for its violation of Mrs. Harris' right, under the Due Process Clause of the Fourteenth Amendment, to receive necessary medical attention while in police custody. *City of Canton v. Harris*, 489 U.S. at 381, 109 S. Ct. at 1201, 103 L. Ed. 2d at 422. The issue of whether the police officers involved could be held individually liable was not before the Court. *Id.* The key to liability was whether the inadequacy of police training amounted to deliberate indifference to the rights of persons with whom

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driving ability and the April 1998 accident and the County Respondents' lack of response to both. App. at 34a. The Superior Court did not give the grounds for its decision, thus may have adopted the County Respondents' argument that unless Respondent Hall was found to violate Petitioners' substantive due process rights, the County parties could not be held liable.

the police came into contact with and whether the City could be held liable for its state-created danger. *Id.*

Significantly, Petitioners contend that the County Respondents can be held liable for their state-created danger and indifference to the rights of the general public who would be exposed to Respondent Hall's known substandard emergency driving, regardless of whether Respondent Hall is found to have violated Petitioners' constitutional rights. *See* K. Blum, *Municipal Liability under Section 1983 Independent of Employee Liability*, 17 Touro L. Rev. 551, 573 (2001) (noting that issue of whether there can be municipal liability under § 1983 absent a finding of a constitutional violation on the part of an individual, non-policymaking, employee "remains a source of confusion for courts and litigants, and the case law continues to reflect that confusion"; suggesting that "[a] finding of direct municipal liability based on the subjective deliberate indifference of policymakers to the safety of citizens is consistent with *Monell, City of Canton* and *County of Sacramento*.").

In *Kneipp v. Tedder*, 95 F.3d 1199, 1213 (3d Cir. 1996), the Third Circuit addressed precisely the same issue. It concluded that "[t]he district court [is] to review the plaintiffs' municipal liability claims independently of the section 1983 claims against the individual police officers, as the City's liability for a substantive due process violation does not depend upon the liability of any police officer."). *See also Natale v. Camden County Corr. Facility*, 318 F.3d 575, 585 (3d Cir. 2003) (allowing § 1983 claim against correctional facility for "turn[ing] a blind eye to an obviously inadequate practice that was likely to result in the violation of constitutional rights" when claims against individual employees had been dismissed); *Casanova v. City of Brookshire*, 119 F. Supp.2d 639, 655 (S.D. Tex. 2000) (considering § 1983 claims related to allegations of policy or custom of the county authorizing or condoning false arrests or

malicious prosecutions when causes of action against individual officers had been dismissed); *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994), *reh'g granted in part on other grounds*, 22 F.3d 1296 (3d Cir. 1994) (en banc) (city is directly liable under § 1983 for causing a violation of the plaintiff's Fourteenth Amendment rights, even if no individual police officer violated the Constitution, if it can be shown that the plaintiff suffered a deprivation of life or liberty because the officer was following city policy reflecting the [city's] deliberate indifference to constitutional rights); *But see Trigalet v. City of Tulsa*, 239 F.3d 1150, 1154-1156 (10th Cir. 2001) (taking position that governmental entity can only be held liable upon a finding that individual officer violated the petitioner's constitution rights) (collecting cases supporting this view).

In this case, Petitioners contend that even if the County Respondents did not know of Respondent Hall's deficiencies in her Emergency Vehicle Operating Course, including her self-reported tunnel vision when driving at high speeds, they knew about her April 14, 1998 accident, in which she damaged her police cruiser so badly that it was taken out of commission and had to be replaced. Record at 210; 221. Yet, the County Respondents, who had a duty to protect the public, failed to take any steps with respect to investigating the April accident until after this fatal accident, and failed to provide Respondent Hall with additional training, supervision or imposing any restrictions or disciplinary actions. Record at 210.

Instead, the County Respondents acted with deliberate indifference to the safety of the public by allowing Respondent Hall to continue to pose a danger to the public by operating Sheriff's Department vehicles in emergency situations. As such the County Respondents should be held liable. As one commentator explained:

> While there is some justification for setting a high threshold of culpability for plaintiffs to meet before

> recovery is allowed against individual officers engaged in rapidly-developing, emergency-type situations, *there is no legitimate reason to apply the same level of culpability to the conduct of policymakers who intentionally and knowingly adopt a course of action that is deliberately indifferent to citizens' health, safety and welfare.* If a jury should determine that the criticized elements of the . . . pursuit policy did indeed make the policy arbitrary and conscience-shocking, and were deliberately and knowingly adopted or ratified by the . . . policymakers, the [governmental entity] should be held directly liable for having violated the substantive due process rights of plaintiffs. Although the officers inflicted the physical injury, the policymakers committed the constitutional violation.

K. Blum, *Municipal Liability under Section 1983 Independent of Employee Liability*,17 Touro L. Rev. 551, 573 (2001).

Consequently, the Maine Supreme Judicial Court should have addressed the substantive due process arguments, with respect to the County Respondents' deliberate indifference, which cost the Petitioners the most fundamental loss of their sons.

E. Petitioners State A Civil Rights Action Against The County Respondents In That Petitioners Allege the Existence Of an Unconstitutional Custom, Policy Or Practice.

In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 690, 98 S. Ct. 2018, 2035-2036, 56 L. Ed. 2d 611, 635 (1977) the Court specifically recognized that local governments, like every other "person" as defined under § 1983, may be sued for constitutional deprivations visited pursuant to governmental custom, even though such a custom has not received formal approval through the body's official

decision making channels. Petitioners alleged sufficient evidence to succeed on a § 1983 claim based on an unconstitutional policy or custom in that despite the noted deficiencies both in Respondent Hall's emergency driving training and performance, no procedure or policy was in place to remove potentially unsafe police officers involved in accidents from the road. Record at 210; Deposition of Deborah Hall dated May 7, 2001 Exhibit 7. This, in fact, was the second high-speed fatality involving allegations of negligent supervision and training involving the Respondent Cumberland County Sheriff's Department before the Maine Supreme Judicial Court in the last two years. *See Selby v. Cumberland County*, 196 A.2d 678, 680 n.3 (Me. 2002) (grant of summary judgment on negligent supervision and training in high speed pursuit case).[9]

F. Respondents Cumberland County And The Cumberland County Sheriff's Department Are Not Entitled To Qualified Immunity Under The Facts.

By any objective measure, Respondents knew or should have known that police officers responding to emergency situations at excessive speeds endangered the health and safety of the public, including the Petitioners' family. In fact, the Cumberland County Sheriff's own policy handbook specifically stated that the Sheriff's Department would be held liable for the consequences of its deputy's reckless driving. Record at 71. Yet tragically, and unnecessarily, no actions were taken to ensure that Respondent Hall was either taken off the road or given the additional training necessary to ensure the safety of the general public. What if this had been a school bus full of children waiting at an intersection that Respondent Hall had crashed into?

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9. The Plaintiffs in the *Selby* case did not raise the constitutional issues before the Maine Supreme Judicial Court. *See Selby v. Cumberland County*, 196 A.2d at 680 n.3.

CONCLUSION

Petitioners respectfully plead this Court to grant this Petition to answer the question that it left open in *County of Sacramento v. Lewis*, namely, whether the Fifth and Fourteenth Amendments to the United States Constitution are violated when a state's lack of post-deprivation remedies and rules of immunity results in the Petitioners being left without any, much less just, compensation for the tragic and unnecessary loss of their sons' lives and their property.

In addition, the substantive due process implications of the Majority of the Maine Supreme Judicial Court's decision, which gives the governmental entities complete carte blanche to allow deputy officers with known unsafe emergency driving records on the road and individual officers the unfettered discretion to violate safety laws in responding to emergency situations must be addressed.

Petitioners respectfully plead the Court to grant this Petition to consider whether the County Respondents should have been held liable for their deliberate indifference to the safety of the general public by allowing Respondent Hall to remain on the road despite their knowledge of her substandard emergency driving record and the fact that she had totaled a cruiser due to excessive speed a few months prior to the fatal accident.

Petitioners further request that this Court should clarify whether Respondent Hall's conduct should have been evaluated under the same "deliberate indifference" standard instead of the higher "shocking-the-conscience" standard, and whether a jury, not a court, should determine whether Respondent Hall's conduct in traveling at an excessive speed, without a siren, and without due care for the public, violated this standard.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME JUDICIAL COURT OF MAINE DECIDED SEPTEMBER 30, 2003

SUPREME JUDICIAL COURT OF MAINE

Docket: Cum-02-467

MICHELLE NORTON et al.

v.

DEBORAH HALL et al.

December 10, 2002, Argued

September 30, 2003, Decided

Panel: SAUFLEY, C.J., and CLIFFORD, RUDMAN, DANA,* ALEXANDER, CALKINS, and LEVY, JJ. Majority: SAUFLEY, C.J., and CLIFFORD, RUDMAN, and LEVY, JJ. Concurrence: SAUFLEY, C.J. Dissent: DANA, ALEXANDER, and CALKINS, JJ.

CLIFFORD, J.

Michelle Norton and John Norton appeal from the summary judgment entered in the Superior Court (Cumberland County, *Humphrey, J.*) in favor of defendants Deborah Hall, the Cumberland County Sheriff's Department, and Cumberland

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* Although not available at oral argument, Justice Dana participated in this opinion. *See* M.R. App. R. 12(a) (stating that a "qualified justice may participate in a decision even though not present at oral argument").

County. The court concluded that the Nortons' suit is barred by the discretionary function immunity provisions of the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101-8118 (2003) and that their constitutional claims are precluded because of qualified immunity. The Nortons contend that their claims arise out of the negligent operation of a motor vehicle, and are not subject to the immunity provisions of the Maine Tort Claims Act or doctrines of qualified immunity. We affirm the judgment.

I.

At approximately 9:43 on the evening of July 8, 1998, Hall, a full-time deputy with the Cumberland County Sheriff's Department, was operating a Sheriff's Department cruiser in the Casco/Raymond area. She received a radio dispatch to respond to a residence in Casco where a six-year-old child was reported to be out-of-control. Hall had made previous responses to this residence that involved physical abuse and alcohol. Although there were no reports of any injuries at that point, only a behavioral problem, Hall was also told that a rescue unit was standing by. Hall initiated an emergency response to this call, based on her belief that there was a serious emergency involving a young child that required her immediate response before the rescue unit would respond.

In her emergency response, Hall contends that she used the vehicle's blue lights and siren. Other witnesses disputed Hall's assertion that her siren was activated. Driving on busy Route 302 in Raymond, Hall was observed passing vehicles at high rates of speed until she collided with the Nortons' vehicle, as it was making a left turn. The Nortons' two sons, ages 15 and 18, died as a result of the collision. Hall was injured.

Appendix A

The Nortons brought negligence, wrongful death, and civil rights claims against Cumberland County, the Cumberland County Sheriff's Department, the State, the Maine Criminal Justice Academy, the Maine State Police, and Hall.[1]

The court later granted the summary judgment motions filed by Hall, the Cumberland County Sheriff's Department and Cumberland County, and entered summary judgment in their favor. The court concluded that Hall's choice to engage in an emergency response was a discretionary function, rendering Hall and the County defendants immune from suit pursuant to the Maine Tort Claims Act, 14 M.R.S.A. §§ 8104-B(3) and 8111(1)(C), and that they were entitled to qualified immunity protecting them from the cause of action asserted pursuant to the Civil Rights Act, 42 U.S.C. § 1983 (1994). This appeal by the Nortons followed.

II.

The Maine Tort Claims Act provides that a governmental entity is not liable for any claims which result from: "[p]erforming or failing to perform a discretionary function or duty, whether or not the discretion is abused. . . ." 14 M.R.S.A. § 8104-B(3) (2003). Section 8111(1)(C) provides similar discretionary function immunity for government employees.[2]

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1. A motion to dismiss the State of Maine defendants was granted, and those dismissals are not challenged in this appeal.

2. Section 8111(1) provides, in pertinent part:

> 1. Immunity. Notwithstanding any liability that may have existed at common law, employees of governmental

(cont'd)

Appendix A

The Nortons contend that Hall's decision to treat and respond to the call involving the out-of-control boy as an emergency is not a discretionary act within the meaning of sections 8104-B(3) and 8111(1)(C). We have used the following four-factor test to determine whether discretionary function immunity applies:

> (1) Does the challenged act, omission, or decision necessarily involve a basic governmental policy, program or objective? (2) Is the questioned act, omission, or decision essential to the realization or accomplishment of that policy, program, or objective as opposed to one which would not change the course or direction of the policy, program, or objective? (3) Does the act, omission, or decision require the exercise of basic policy evaluation, judgment, and expertise on the part of the governmental agency involved? (4) Does the governmental agency involved possess the

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(cont'd)

> entities shall be absolutely immune from personal civil liability for the following:
>
> . . . .
>
> C. Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid;

14 M.R.S.A. § 8111(1)(C) (2003).

> requisite constitutional, statutory, or lawful authority and duty to do or make the challenged act, omission, or decision?

Roberts v. State, 1999 ME 89, ¶ 8, 731 A.2d 855, 857 (citations omitted). The response to an emergency by a law enforcement officer serves the basic governmental objective of public safety. *See Selby v. Cumberland County*, 2002 ME 80, ¶ 7, 796 A.2d 678, 680. In *Selby*, we held that a deputy sheriff's decision to engage in a high-speed chase is a discretionary decision to which discretionary immunity applies. *Id.* ¶ 10, 796 A.2d at 681-82.

The Nortons also contend that even if the initial decision by Hall to respond to the call as an emergency is an act protected by discretionary immunity, the actions taken in that response, particularly the operation of the vehicle, are not protected. The Nortons rely on section 8104-A(1)(A), which provides that "[a] governmental entity is liable for property damage, bodily injury or death" arising from "its negligent acts or omissions in its ownership, maintenance or use of any . . . [m]otor vehicle." 14 M.R.S.A. § 8104-A(1)(A) (2003). Because the deaths in this case resulted from Hall's operation of a police cruiser, the Nortons contend they are entitled to recover. We disagree.

First, the decision by Hall to respond to the emergency (the *whether* to respond) cannot be isolated from the response itself (the *how* to respond). The exercise of discretion involves more than a decision in the abstract to respond. Actions taken by a law enforcement officer in response to an emergency implicate the discretionary judgment of the officer

and the immunity protecting governmental entities and their employees extends to those actions. The operation of the cruiser on the way to the emergency is an integral part of, and cannot be separated from, the initial decision to respond.

In *Roberts*, a prison inmate was injured when a cell door was slammed on his finger by a prison guard as the inmate was entering the cell. 1999 ME 89, ¶ 2, 731 A.2d at 856. In the suit brought by the inmate, a summary judgment was entered in favor of the prison guard and the State, based in part on discretionary function immunity. 14 M.R.S.A. §§ 8104-B(3) & 8111(1)(C); *Roberts*, 1999 ME 89, ¶ 5, 731 A.2d at 856-57. We rejected the inmate's argument that the guard's specific act of shutting the cell door on the inmate's hand had to be considered as separate and distinct from the discretionary decision of the prison guard to place the inmate in his cell. *Id.* ¶ 10, 731 A.2d at 857-58. We concluded that, for purposes of discretionary function immunity, the decision to place the inmate in the cell included the shutting of the cell door when the inmate himself failed to shut the door or the door failed to shut by itself. *Id.*

Moreover, although section 8104-A(1)(A) provides that "[a] governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any: A. Motor vehicle," section 8104-B(3) provides a governmental entity with discretionary function immunity *despite* section 8104-A. 14 M.R.S.A. § 8104-B(3). If the actions taken by Hall in carrying out an emergency response were separated and placed in a different category from her decision *to* respond, discretionary function immunity would effectively be removed as a defense in any case involving the operation

of a motor vehicle. The express language in section 8104-B(3) and 8111(1) of the Maine Tort Claims Act precludes such a result.

Section 8104-B provides:

> *Notwithstanding* section 8104-A, a governmental entity is *not* liable for any claim which results from:
>
> . . . .
>
> 3. Performing Discretionary Function. Performing or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution or policy under which the discretionary function or duty is performed is valid or invalid[.]

14 M.R.S.A. § 8104-B(3) (emphasis added). In keeping with the statutory language, in *Carroll v. City of Portland*, we expressly noted that "*[n]otwithstanding* the immunity waiver provisions of section 8104-A, section 8104-B *expressly retains* certain types of *immunity* for governmental entities, *including discretionary function immunity.*" 1999 ME 131, ¶ 6 n.3, 736 A.2d 279, 282 (emphasis added).

Moreover, 14 M.R.S.A. § 8111(1)(C) provides *absolute immunity* to Hall for performing or failing to perform any discretionary function or duty, regardless of whether or not

she abuses that discretion. The immunity applies "whenever a discretionary act is reasonably encompassed by the duties of the governmental employee . . . [and is] available to all government employees, including police officers. . . ." *Id.* § 8111(1). It is difficult to imagine clearer statutory language to immunize law enforcement personnel for the actions they take in the responses to a legitimate emergency.

The fact that the conduct of Hall in responding to an emergency is protected by the immunity provisions of the Tort Claims Act does not render 14 M.R.S.A. § 8104-A(1)(A) meaningless. Not all operations of public safety vehicles involve discretionary acts protected by the provisions of section 8104-B(3) and section 8111(1)(C). For example, provisions of section 8104-A(1)(A) still apply to the everyday non-discretionary operation of governmental motor vehicles, such as routine patrolling. The limited exception to immunity for the operation of motor vehicles set out in section 8104-A(1)(A), however, does not remove otherwise applicable discretionary function immunity arising from the officer's discretionary response to a true emergency. *See* 14 M.R.S.A. § 8104-B(3).

The Statement of Fact to L.D. 2443, which was enacted as 14 M.R.S.A. § 8111, states as follows:

> [I]t bears emphasis that the immunities contained in Title 14, section 8111 are intended to serve important governmental purposes. Government officials are frequently required as part of their jobs to take actions that have serious consequences for the individuals affected. Obvious examples are

> the actions of law enforcement officers investigating crimes. . . . If these government officials were faced with the constant possibility of personal liability, the inevitable result would be that they would be hesitant to take necessary enforcement action and the public interest would suffer.

L.D. 2443, Statement of Fact at 15 (113th Legis.1987). The Legislature clearly intended to grant immunity to law enforcement officers responding to a legitimate emergency. Any other result would be contrary to the letter and the spirit of the Maine Tort Claims Act.

The Nortons also contend that if Hall is protected by immunity for the actions she took with the cruiser, then the emergency vehicle statute, 29-A M.R.S.A. § 2054 (1996 & Supp. 2002), would be rendered meaningless. We disagree. That statute provides that drivers of emergency vehicles have the benefit of certain privileges, such as exceeding the posted speed limit or driving through a red light. *Id.* § 2054(5). These privileges are dependent on the operator using the vehicles emergency lights at all times when responding to an emergency, and also using the siren when it is "reasonably necessary to warn" other drivers. *Id.* § 2054(6). The parties do not dispute that Hall was using the vehicle's emergency lights, although there is dispute about whether the vehicle's siren was operating at the time of the accident. Section 2054, however, does not effect immunity. First, the emergency vehicle statute sets out rules of the road for the operation of emergency vehicles, but it does *not* address liability of governmental entities or their employees for damages arising

out of the use of such vehicles. *See id.* § 2054. Moreover, as the trial court correctly noted, even if Hall acted contrary to the statutory rules of the road for the operation of emergency vehicles, the statutes do not strip her of the discretionary immunity provided under the Maine Tort Claims Act. In *Selby*, we concluded that "[i]mmunity exists even when the official lacked the authority to do the act, or abused the discretion." 2002 ME 80, ¶ 6, 796 A.2d at 680. Accordingly, the court correctly concluded that even if Hall was not using her vehicle's siren, she was nevertheless entitled to discretionary immunity in the operation of the cruiser.

III.

The Nortons also contend that they have produced facts sufficient to support their § 1983 civil rights claims because the circumstances of an out-of-control child was not an emergency within the meaning of the statute, and further that Hall acted with "deliberate indifference" when responding to the call.[3] The Nortons further argue that the defendants are not entitled to qualified immunity because Hall's actions were not objectively reasonable, and violated clearly established constitutional rights.

The Nortons' contentions that they have been deprived of their constitutional rights provided by the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution and Article I sections one, five, and six of the

3. The Nortons also raised constitutional claims under the Maine Civil Rights Act. The analysis of such claims is similar to federal civil rights claims and we do not address them separately. *See Fowles v. Stearns*, 886 F. Supp. 894, 899 n.6 (D. Me. 1995).

Maine Constitution are without merit. Their claim of deprivation of their substantive due process rights protected by the Fourteenth Amendment is also without merit. We agree with the Superior Court that this argument fails because the Nortons did not demonstrate that Hall's conduct "shocks the conscience." *See County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

In *County of Sacramento*, the United States Supreme Court held that a police officer did not violate the Fourteenth Amendment's guarantee of substantive due process by causing the death of a motorcycle passenger through deliberate or reckless indifference when pursuing the motorcycle driver in a high-speed chase. *Id.* at 853-54, 118 S. Ct. 1708. The Court determined that in those circumstances, only an intent to harm, unrelated to the legitimate purpose of pursuing an arrest, would satisfy the necessary element of arbitrary conduct shocking to the conscience. *Id.* Pursuant to this standard, "only the most egregious official conduct can be said to be arbitrary in the constitutional sense." *Id.* at 846 (quotation omitted). The Court explained the behavior meeting the lower standard of deliberate indifference might be conscience shocking in some circumstances, like a custodial prison situation, but that a different and higher standard applies when events call for "fast action," and require the balancing of competing concerns under pressure, without the luxury of a second chance. *Id.* at 852-53, 118 S. Ct. 1708. The Court found that a high-speed chase met this criteria. *Id.* at 853, 118 S. Ct. 1708.

Hall's decision to respond to a call as an emergency is analogous to a decision to engage in a high-speed chase.

Appendix A

To respond effectively to an emergency, an officer must make an immediate decision. Hall weighed her concern for the welfare of a child, and those in the child's presence, against the risk of speeding and exposing other citizens to danger. Under these circumstances, the Superior Court correctly concluded that the highest standard of "intent to harm" applies and, since there is no evidence that Hall intended to harm the Nortons, no constitutional violation. *See id.* at 854. Even if the Nortons had produced facts sufficient to support a constitutional claim, Hall would be entitled to qualified immunity because, given the information she possessed, her conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982).

The entry is:

Judgment affirmed.

SAUFLEY, C.J., concurring.

I join the majority opinion of the Court in full and write additionally in concurrence to identify what I believe to be the fulcrum of the analytical dispute that has caused the Court to issue separate opinions on this very important matter.

It is unquestioned that the Tort Claims Act provides immunity from liability to government actors who are involved in discretionary functions.[4] Both the Court and the dissent agree that the decision to respond to an emergency is a discretionary function and, therefore, falls within the immunities provided by the Tort Claims Act.

The analysis diverges, however, with regard to the possibility of separating the "whether" of the emergency response from the "how" of the emergency response. The Court in its opinion has found no reasonable basis upon which to conclude that the Legislature intended that courts or juries engage in the subtle teasing apart of those two concepts. Thus, the Court has concluded that it is the Legislature's current intent to cloak the emergency response, both the decision to respond, and the method of response, with sovereign immunity.

It is within the Legislature's province to decide whether in the future those two concepts *should* be separated and whether one or both should not be shielded from liability for negligence. Because I agree with the Court that the

4. Contrary to the analysis of the dissent, the Court's majority opinion today has not "changed the law." It merely enforces the change in the law brought about by the Tort Claims Act.

Legislature has not yet articulated that distinction, and because it is the Legislature's role to weigh the competing policy interests, not the role of the Court, I join the Court's opinion today.

ALEXANDER, J., with whom DANA, J. and CALKINS, J., join dissenting.

I respectfully dissent. Prior to enactment of the Maine Tort Claims Act, governmental entities, though protected by sovereign immunity,[5] accepted responsibility for injuries to others caused by negligent operation of their motor vehicles. *See Russell v. Nadeau*, 139 Me. 286, 29 A.2d 916 (1943) (affirming a finding of liability in a case where a plaintiff's injuries were caused by a fire truck, responding to an emergency call, which entered an intersection against a red light); *Parker v. Knox*, 147 Me. 396, 87 A.2d 663 (1952) (allowing a plaintiff's claim that a police officer's negligent driving had caused his injuries); *Blier v. Inhabitants of Town of Fort Kent*, 273 A.2d 732, 737 (Me.1971) (recognizing a statute waiving governmental immunity, to the extent of insurance coverage, for losses caused by negligent operation of a motor vehicle).

The Maine Tort Claims Act continued this acceptance of responsibility for injuries caused by negligent operation of government motor vehicles in 14 M.R.S.A. § 8104(1)(A) (2003), quoted in the Court's opinion. Today the Court's

5. The Maine Tort Claims Act was enacted by P.L.1977, ch. 2, after we "abrogated" the sovereign immunity defense in *Davies v. City of Bath*, 364 A.2d 1269 (Me. 1976).

opinion terminates that long-standing acceptance of responsibility for injuries caused by negligent driving of government employees on discretionary government business. The Court accomplishes this change in the law by holding that the discretionary function immunity provisions of the Act,[6] mean that the discretionary decision "to respond to the emergency (the *whether* to respond) cannot be isolated from the response itself (the *how* to respond)." *See supra* ¶ 9 (emphasis in original). This view is directly contrary to our holding in *Russell*, where we stated that government drivers, doing their duty responding to an emergency, and consequently exempt from traffic regulations, were not relieved "from the duty of exercising due care to prevent injury to themselves and others lawfully upon the ways." 139 Me. at 288, 29 A.2d at 917.

The Court's opinion is also contrary to interpretations of the discretionary function immunity provisions of the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680 (2000), although the wording of the Maine discretionary immunity provisions is very similar to their federal counterparts. Thus, 28 U.S.C. § 2680(a) states, in pertinent part, that the United States is not liable for any claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused." In Maine, 14 M.R.S.A. § 8104(B)(3) exempts a government entity from liability for "[p]erforming or failing to perform a discretionary function or duty, whether or not the discretion

6. 14 M.R.S.A. §§ 8104(B)(3) and 8111(1)(C).

is abused. . . ." Separately, government employees are exempt from liability for "[p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused. . . ." 14 M.R.S.A. § 8111(1)(C). The liability exemption for employees extends to any discretionary act "reasonably encompassed by the duties of the governmental employee in question." *Id.* § 8111(1).

Under the FTCA, vehicle accidents have generally been treated as not involving discretionary function immunity. *See* Donald N. Zillman, *Protecting Discretion: Judicial Interpretation of the Discretionary Function Exception to the Federal Tort Claims Act*, 47 ME. L. REV. 365, 373 (1995). This acceptance of liability has extended to negligent operation of emergency vehicles. *See* Dag E. Ytreberg, Annotation, *Federal Tort Claims Act: Automobile Negligence Cases*, 4 A.L.R. FED. 6 § 7[e] (1970), summarizing cases. Sometimes the federal emergency vehicle cases result in a finding of liability, sometimes they do not, but those findings occur after trial, not as a result of a summary judgment because of discretionary function immunity. *See Stuuk v. United States*, 129 F. Supp. 530 (D.N.H. 1954); *Anderson v. United States*, 117 F. Supp. 438 (D. Fla. 1954) (finding liability in emergency vehicle collision); *Seaberg v. United States*, 448 F.2d 391 (9th Cir. 1971); *Patterson v. United States*, 204 F. Supp. 845 (E.D.N.Y.1961), *aff'd*, 303 F.2d 280 (2nd Cir. 1962); *State of Washington v. United States*, 194 F.2d 38 (9th Cir. 1952) (finding no liability in emergency vehicle collision).

We recently examined the applicability of the discretionary function immunity provisions to emergency high-speed

operations of county police vehicles in *Selby v. Cumberland County*, 2002 ME 80, 796 A.2d 678. We held that a deputy's choice to engage in a high-speed chase was entitled to discretionary function immunity even if the discretion was abused. *See id.* ¶ 14. In *Selby*, the motor vehicle exception to immunity did not apply because the injury caused by the pursued vehicle arose not from the negligent operation of the county vehicle but the discretionary choice of a law enforcement officer to engage in a high-speed chase.[7]

We also examined the relationship of the motor vehicle operation liability and the discretionary function immunity provisions in *Brooks v. Augusta Mental Health Institute*, 606 A.2d 789 (Me.1992). In *Brooks*, a voluntary patient at the Augusta Mental Health Institute (AMHI) died as a result of injuries received from jumping out the exit door of a moving bus while traveling with a group of patients under the supervision of three AMHI employees. *Id.* at 790. We determined that the basis of the complaint in *Brooks* was that the AMHI employees were negligent in their supervision of the decedent. We noted that the claimed negligence involved the exercise of the individual employee's professional judgment with regard to supervision of patients "not the defendants' negligent operation, use or maintenance of the bus." *Id.* at 790. This professional judgment was entitled to discretionary function immunity because the use or operation of the motor vehicle in which the patients were traveling

7. Selby was a passenger in the vehicle pursued in a high-speed chase. He was injured when the vehicle in which he was riding collided with another vehicle. The county patrol cruiser was not directly involved in the collision which caused Selby's injuries. *Selby*, 2002 ME 80, ¶ 2, 796 A.2d 678, 679.

was not implicated in any alleged errors of supervision. *Id.* at 791.

Neither *Selby* nor *Brooks* involved a collision with a negligently operated government vehicle. Therefore, liability under the motor vehicle operation exception to the Maine Tort Claims Act was not generated.

We are reviewing a grant of a summary judgment. Accordingly, we must construe the evidence most favorably to the party against whom summary judgment was granted. *Wentworth v. Sebra*, 2003 ME 97, ¶ 9, 829 A.2d 520. Thus, for purposes of this analysis, we must presume that Hall's choice to engage in an emergency high-speed response was an abuse of her discretion and that, at the time her vehicle collided with the Norton's vehicle, Hall was operating her vehicle, in the course of her emergency response, in a negligent manner.

In the quarter century that the Maine Tort Claims Act has been in effect, we have never held that negligent operation of a motor vehicle directly involved in a collision is subject to discretionary function immunity. The motor vehicle liability and discretionary immunity provisions of the Maine Tort Claims Act—just like the FTCA—can be read as part of a consistent body of law, reflecting the validity of both provisions. Even before the Maine Tort Claims Act, we distinguished the discretionary choice to initiate and maintain an emergency response from any negligent operation of a vehicle in the course of the emergency response. *See Parker*, 147 Me. at 401, 87 A.2d at 666.

Appendix A

In *Russell*, 139 Me. at 288, 29 A.2d at 917, the case most analogous to this case, we held that while government vehicles responding to emergencies have the right of way and may be exempt from traffic regulations, these privileges:

> do not relieve their operators from the duty of exercising due care to prevent injury to themselves and others lawfully upon the ways. . . . [t]hey must include in the care they are bound to exercise reasonable precautions against the extraordinary dangers of the situation which duty compels them to create. . . . Even if the driver of the other vehicle through negligence disregards their right of way they must still use due care to avoid a collision. The measure of their responsibility is due care under all the circumstances.

Id.

While an individual's actions in an emergency situation may be judged differently, a person engaged in or confronted with an emergency situation may be judged to have acted negligently in that situation. *Hargrove v. McGinley*, 2001 ME 36, ¶¶ 6-7, 766 A.2d 587, 589-90; *Ames v. Dipietro-Kay Corp.*, 617 A.2d 559, 561-62 (Me.1992); *Hoch v. Doughty*, 224 A.2d 54, 56-57 (Me.1966); *Russell*, 139 Me. 286, 29 A.2d 916.[8]

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8. *Roberts v. State*, 1999 ME 89, 731 A.2d 855, on which the Court's opinion so heavily rests, involved a claim of negligence in operation or maintenance of a building, not negligence in driving a

(cont'd)

Appendix A

The facts in this case indicate—as *Russell v. Nadeau* indicates—that there is a distinction between a proper emergency response and a negligent emergency response. Both at the Maine Criminal Justice Academy and later in an incident on the road, deficits, or negligence, had been noted in Hall's high-speed emergency response driving capabilities. Because of those deficits, Hall's emergency response authority had been limited.

A claim of liability arising out of an accident with a government vehicle engaged in an emergency response involves two separate questions: First, was the choice to engage in an emergency response and the consequent high-speed driving proper? and

Second, was the vehicle operated in a negligent manner in the course of the emergency response, considering all the circumstances, including the exemption from traffic regulations permitted to an emergency response vehicle and the due care which the operator of the emergency response vehicle must observe, even while engaged in the emergency response?

(cont'd)

motor vehicle. Notably, one of the negligence claims in *Roberts* had gone to trial, with a judgment for the State. *Id.* ¶ 5, 731 A.2d at 857. That trial was not the focus of the Court's statements in *Roberts* regarding the law, but it does make *Roberts* an uncertain precedent for the proposition that in claims involving discretionary functions, the Court need not separately examine whether negligence occurred in the course of performing the discretionary function.

Appendix A

The discretionary function immunity provisions of sections 8104(B)(3) and 8111(1)(C) exempt the choice to engage in an emergency response from liability on judicial review, even if that choice is mistaken. But section 8104(A)(1), establishing liability for negligent operation of a motor vehicle, allows a cause of action for negligent operation in the course of an emergency response. Accordingly, the Superior Court's judgment should be vacated and the matter remanded for trial on the questions of whether Hall negligently operated her motor vehicle in the course of her emergency response and whether any negligence or failure to exercise due care proximately caused any injury to the Nortons.

APPENDIX B — ORDER OF THE MAINE SUPERIOR COURT DATED JULY 3, 2002

SUPERIOR COURT

CIVIL ACTION

DOCKET NO. CV-00-406

STATE OF MAINE

CUMBERLAND, ss

MICHELLE NORTON et al.,

Plaintiffs

v.

COUNTY OF CUMBERLAND, et al.,

Defendants

ORDER ON MOTIONS
FOR SUMMARY JUDGMENT

Appendix B

This matter is before the court on the motions of the defendants[1] Deborah Hall ("Hall"), Cumberland County ("County") and the Cumberland County Sheriff's Department ("CCSO") for Summary Judgment on the remaining claims in the plaintiffs' complaint for negligence against the County, CCSO, and Hall (Count II); punitive damages against Hall (Count III); negligence against Hall (Count IV); and claims under 42 U.S.C. § 1983 against Hall (Count V).[2]

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1. In this order, the court has implicitly dealt with Hall's pending Motion to Strike portions of the plaintiffs' Statement of Material Facts and the plaintiffs' pending Motion to Strike Hall's Statement of Material Facts.

To the extent that Hall challenges factual assertions by the plaintiffs not properly supported, the court has already evaluated any assertions for just such a purpose and, to the extent she objects to responses that do not specifically dispute or qualify assertions in Hall's Statement of Material Fact, the court has attempted to give a fair reading to the plaintiffs' actual assertions.

The plaintiffs' motion only challenges Hall's assertions that (i) her siren was on, (ii) her actions were within the scope of her employment and (iii) were taken in good faith. The court has taken into account the dispute as to whether Hall's siren was on and is well aware that Hall's assertion that she was acting in good faith is a selfserving statement. The court has also discounted any "factual" assertion that the challenged acts were within the scope of Hall's employment.

2. All of the claims against the State of Maine, Maine State Police, and Maine Criminal Justice Academy in Counts I, III, IV and VI have been dismissed. All of the claims against the County and CCSO in Counts III, IV and V have been dismissed, but those in Count II remain.

Appendix B

I. BACKGROUND

On July 8, 1998, Hall was operating a CCSO cruiser in her capacity as a Cumberland County Deputy Sheriff. Defendant Hall's Statement of Material Facts (Hall-SMF) ¶ 1; Plaintiffs' Response to Hall's Statement of Material Fact (PRH-SMF) ¶ 1; Defendant County and CCSO Statement of Material Facts (County-SMF) ¶ 1; Plaintiffs' Response to County's Statement of Material Fact (PRC-SMF) ¶ 1. While in Windham, Maine, she received a radio transmission from dispatch requesting that she respond to the Robert Morton residence in Casco, Maine, regarding an out of control six-year old child with attention disorder. County-SMF ¶ 11; PRC-SMF ¶ 11; Hall-SMF ¶ 2; Plaintiffs' Statement of Disputed Material Facts (PSDMF) ¶ 2; Defendant Hall's Response to Plaintiffs Statement of Fact (Hall-RPSDMF) ¶ 2; Dion Dep. Exh. 2. Hall's supervisor also responded to the call. Hall-SMF ¶ 3. Hall was familiar with Robert Morton and his residence based upon her prior responses to calls involving physical violence, alcohol, and general combativeness at that residence. Hall-SMF ¶¶ 8, 9; PRC-SMF ¶¶ 8, 9.

Hall was told that a rescue unit was "standing by at the station until further notified." County-SMF ¶ 3; Dion Dep. Exh. 2. Hall asked dispatch if there were any injuries and was told, "[a]t this point we're only aware of the behavioral problem." PSDMF ¶ 5; Hall-RPSDMF ¶ 5; County PSDMF ¶ 5 Dion Dep. Exh. 2.

Based on the foregoing and on her law enforcement experience, Hall formed a belief that there was a serious

emergency involving the welfare of a six-year old child which required her immediate presence at the scene before the rescue unit would respond. Hall-SMF ¶ 5; PRC-SMF ¶ 5; Hall Dep. p. 171 lines 12-25, p. 172 lines 1-4. She responded to the call with her cruiser's emergency blue lights activated. Hall-SMF ¶ 10; PRH-SMF ¶ 10.[3]

While responding, Hall travelled through several speed zones on Route 302. PSDMF ¶ 11; Hall-RPSDMF ¶ 11. Although it is undisputed that she exceeded posted speed limits, there is disagreement as to her actual speed.[4] As Hall approached Wharf Road, a dirt road in Raymond, Maine that connects to Route 302, she received the beginning of a transmission from dispatch. Hall-SMF ¶ 12; PRH-SMF ¶ 12; PSDMF ¶ 25. There was a line of cars ahead of her on Route 302. Hall-SMF ¶ 13; Hall-PRH-SMF ¶ 13. Hall picked up the microphone in her lap and told dispatch to "go ahead". Hall-SMF ¶¶ 14-15; PRH-SMF ¶¶ 14-15; County-SMF ¶ 17; PRC-SMF ¶ 17; Hall Dep. p. 180 lines 7-12.[5] The plaintiffs'

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3. There is a factual dispute as to whether Hall's siren was activated throughout her emergency response.

4. Several eyewitnesses testified that Hall was traveling at an excessive rate of speed (65 in a 35 zone; 90 in a 50 zone; too fast for any vehicle). PSDMF ¶¶ 12-14; Hall-RPSDMF ¶¶ 12-14.

5. Dispatch responded as follows:

> "Apparently the parents just called Raymond Dispatch and stated that the 10-94 is calmed down now. *I asked if we were all set to disregard. No one was sure.*"

(Cont'd)

vehicle, which was in that line of cars, turned left to enter Wharf Road. Hall-SMF ¶¶ 14, 15.[6] Hall's cruiser struck the plaintiffs' vehicle. County-SMF ¶ 20; PRC-SMF ¶ 20; Hall-SMF ¶ 16; PRH-SMF ¶ 16; Hall Dep. p. 176 lines 19-25, p. 180 lines 23-25. John and Matthew Norton were in that vehicle and died as a result of the collision.

The CCSO and its deputy sheriffs are charged with responsibility for providing patrol and emergency services for Cumberland County. Hall-SMF ¶ 17; PRH-SMF ¶ 17. The CCSO issued a Field Services Manual ("Manual") to Hall and required her to read and know its contents. Hall-SMF ¶ 18; PRH-SMF ¶ 18. Emergency responses are governed by General Order 2-17 of the Manual. Hall-SMF ¶ 20; PRH-SMF ¶ 20; Manual, General Order 2-17(V).

At the time of the accident, the County was a member of a self-funded insurance risk pool that did not waive the immunities afforded by the Maine Tort Claims Act. County-SMF ¶¶ 23, 24; PRC-SMF ¶¶ 23, 24.

(Cont'd)

Dion Dep Exh 2 (emphasis added). Hall denies hearing the message because "[t]he accident happened before I heard what they said." Hall Dep at 180, lines 13-15. Even if she had heard it, a fair understanding of the message is that dispatch was uncertain as to whether the call should be disregarded. The message did not affirm that the situation that prompted the initial call had abated.

6. There is a factual dispute as to whether the left turn signal on the plaintiffs vehicle was activated at the time.

Appendix B

II. DISCUSSION

A. *Count II: Negligence and Vicarious Liability (Hall. County and CCSO)*

(1) *Discretionary Function Immunity*

Government employees are immune from liability when performing any discretionary function or duty. *See* 14 M.R.S.A. § 8111(1)(C) (Supp. 2001); *Selby v. Cumberland County*, 2002 ME 80, ¶ 6, 796 A.2d 678, 680. A governmental entity is immune from liability for negligent acts or omissions in its use of a motor vehicle in the performance of a discretionary function or duty, even if the discretion is abused. 14 M.R.S.A. §§ 8104-A, 8104-B (Supp. 2001).

Providing emergency services is a basic law enforcement governmental policy and objective. Responding to calls for emergency services "is essential to the realization or accomplishment of [that] basic governmental policy program or objective." *Selby*, 2002 ME 80, ¶ 7, 796 A.2d at 680 (citations omitted). The CCSO's regulations make clear that the decision to respond to a dispatch call on an emergency basis is within a deputy's discretion. Correspondingly, decisions regarding the manner in which to respond to an emergency requires the exercise of basic policy evaluation, judgment and expertise by the officer. Thus, applying the four-factor test adopted by the Law Court, this court concludes that Hall was engaged in the performance of a discretionary function. *Adriance v. Town of Standish*, 687 A.2d 238, 240 (Me. 1996) (quoting *Darling v. Augusta Mental Health Institute*, 535 A.2d 421, 426 (Me. 1987)).

Appendix B

The court does not agree with the plaintiffs argument that the focus of this inquiry should be narrowed to Hall's act of attempting to pass the plaintiff's vehicle. Rather, Hall's conduct must be viewed in the broader context of her decision to treat the call as an emergency and to respond accordingly. Hall would not have attempted to pass the plaintiff's car had she not already made the threshold decision to respond to the call as an emergency.

Hall had the discretion and the authority to respond to the dispatch call on an emergency basis and travel at speeds in excess of posted limits when doing so. Hall's discretionary function immunity was not lost even if she violated CCSO policies and guidelines in the execution of her emergency response. An officer's absolute immunity applies even if her acts were not authorized. *Selby*, 2002 ME 80, ¶ 6, 796 A.2d at 680 (citation omitted); *see also Doucette v. City of Lewiston*, 1997 ME 157, ¶ 6, 697 A.2d 1292, 1294 ("controls on [the dispatcher's] behavior [imposed by manual's guidelines] did not transform the basic discretionary nature of her duties"). Viewing the facts, including the disputed facts, in a light most favorable to the plaintiffs,[7] the court concludes that, although the record strongly indicates that Hall was negligent, her actions did not "so clearly exceed the scope of [her] authority that [she] cannot be said to have been acting in an official capacity." *Selby*, 2002 ME 80, ¶ 6 n. 5, 796 A.2d at 680 n. 5 (citations omitted).

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7. For the purposes of this analysis, the court accepts the plaintiffs' assertions that Hall's siren was not activated at least in the moments before the collision and that her speed was "*at least* 86 mph immediately prior to impact" in a 55 mph zone. PSDMF ¶ 17.

Appendix B

The plaintiffs also argue that Hall lost her immunity because she violated the law regarding the operation of emergency vehicles. 29-A M.R.S.A. § 2054(5) (1996 & Supp. 2001). That law extends certain privileges to the operators of emergency vehicles when responding to emergency calls, most notably the privilege of exceeding maximum speed limits and disregarding "regulations governing direction of movement or turning in specified directions". 29-A M.R.S.A. § 2054(5)(C) & (D) (1996 & Supp. 2001). Eligibility for the statutory privilege is grounded on the mandatory use of the vehicle's emergency lights at all times during the emergency response and the discretionary use of the "siren when reasonably necessary to warn . . . other operators of the emergency vehicle's approach." 29-A M.R.S.A. § 2054(6) (1996).[8] The consequence for failing to meet those eligibility requirements is the loss of the privilege.

The undisputed facts reflect that Hall's emergency lights were on at the time of the collision. Although her siren may have been off, it was a discretionary choice accorded her under the law. Thus, it does not appear that Hall had lost the statutory privilege at the time of the accident. Even if she had, the lack or loss of the privilege in and of itself does not negate the discretionary function immunity available to her under the Maine Tort Claims Act. If such immunity otherwise exists, it is only lost if the operator "so clearly exceeds" the scope of her authority that she cannot be deemed to be acting

---

8. There is no evidence in the record that Hall did not use her emergency lights. There is a dispute as to whether the cruiser's siren was on in the moments before the collision. For the purposes of this analysis, the court accepts the plaintiffs' assertion that the siren was not activated in the moments leading up to the collision.

in her official capacity. *Selby*, 2002 ME 80, ¶ 6 n. 5, 796 A.2d at 680 n. 5 (citations omitted). Negligent though it may have been, Hall's conduct did not propel her beyond the scope of her authority.

(2) *Constitutional Issue*

In the context of qualified immunity for constitutional violations, the United States Supreme Court has held that an officer does not lose qualified immunity unless the statute (or regulation) clearly establishes a cause of action for damages for its violation. *Davis v. Scherer*, 468 U.S. 183, 194 & n.12 (1984). Accordingly, the immunity for discretionary functions accorded to Hall in this case is not abrogated because there is no statutory violation that gives rise to an independent claim for damages against her.

(3) *Insurance*

The plaintiffs argue that, even if Hall is immune, the County remains liable because it procured insurance to cover the plaintiffs' claims in this case. 14 M.R.S.A. § 8116 (Supp. 2001); *see Danforth v. Gottardi*, 667 A.2d 847, 848 (Me. 1995) ("the governmental entity against whom a claim is made bears the burden of establishing that it does not have insurance coverage for that claim") (citation omitted); *see also Richards v. Town of Eliot*, 2001 ME 132, ¶ 42, 780 A.2d 281, 295.

However, the County's liability insurance expressly provided that the insured did not waive the immunities afforded by the Maine Tort Claims Act. County-SMF ¶ 24;

PRC-SMF ¶ 24; *see Doucette*, 1997 ME 157, ¶¶ 8-10, 697 A.2d at 1294-95. A county is liable for negligent acts or omissions in its ownership, maintenance, or use of a motor vehicle. *See* 14 M.R.S.A. § 8102(2) & (3) (1980 & Supp. 1999); § 8104-A(1)(A) (Supp. 2001). A county is not liable for any claim arising out of the performance of a discretionary function. *See* 14 M.R.S.A. § 8104-B(3) (Supp. 2001). Hall was performing a discretionary function while operating her cruiser at the time of the accident.

B. *Count III*: *Punitive Damages (Hall)*

There is no evidence on this record that Hall acted with malice or ill will toward the plaintiffs or that her conduct, negligent though it may have been, was "so outrageous that malice toward a person injured as a result of that conduct can be implied." *Tuttle v. Raymond*, 494 A.2d 1353, 1361 (Me. 1985) (" 'implied' or 'legal' malice will *not* be established by the defendant's mere reckless disregard of the circumstances"). Accordingly, the claim for punitive damages cannot be sustained.

C. *Count IV*: *Negligence — Failure to Investigate (Hall)*

The plaintiffs claim that Hall was negligent because she failed to investigate a prior accident in which she was involved. Hall had no duty to investigate her prior accident. Without a duty, a claim of negligence cannot be sustained. *Mastriano v. Blyer*, 2001 ME 134, ¶ 11, 779 A.2d 951, 954 *(quoting Stanton v. Univ. of Maine Sys.*, 2001 ME 96, ¶ 7, 773 A.2d 1045, 1049) (a prima facie case of negligence "requires a plaintiff to establish four elements: ". . . 'a duty

owed, breach of that duty, and an injury to the plaintiff that is proximately caused by a breach of that duty.' ").

D. *Count V: 42 U.S.C. § 1983 Claims (Hall)*

The issue here appears to be whether there was a substantive due process violation and, in the context of this case, whether the challenged conduct was so extreme as to "shock the conscience." *Cummings v. McIntire*, 271 F.3d 341, 344 (1st Cir. 2001). There has been no showing on this record that Hall acted maliciously or sadistically for the purpose of causing harm. Rather, she had information and prior experiences that led her to effect an emergency response. Even if she exceeded the speed limit guidelines of the CCSO's manual and did not utilize her siren when she should have, the level of fault attributable to her was one of negligence and "there is no reason to believe that [her acts] were tainted by an improper or malicious motive on [her] part." *County of Sacramento v. Lewis*, 523 U.S. 833, 855 (1998).

III. DECISION

Based upon the foregoing, the motions of the defendants Hall, County and CCSO for Summary Judgment is GRANTED.

Pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on Motions for Summary Judgment on Motions for Summary Judgment on the Civil Docket by a notation incorporating it by reference.

Dated: July 3, 2002

s/ Hon. Thomas E. Humphrey
Justice, Superior Court

APPENDIX C — ORDER OF THE MAINE SUPERIOR COURT DATED DECEMBER 28, 2000

STATE OF MAINE
CUMBERLAND, SS.

SUPERIOR COURT
CIVIL ACTION
Docket No. CV-00-406

ORDER

MICHELLE NORTON, et al.,

Plaintiffs,

vs.

COUNTY OF CUMBERLAND, et al.,

Defendants

Upon Motion to Dismiss by Defendants Cumberland and the Cumberland County Sheriff's Department, notice to all parties, and a hearing, the Court finds that the Plaintiffs' allegations pertaining to the County and the Department fail to impart to state causes of action upon which relief could be granted. Specifically, the Court finds:

1. The Plaintiffs' allegations do not implicate the Fourth, Fifth, Sixth and Eighth Amendments to the United States Constitution;

2. The Complaint's allegations do not meet the Fourteenth Amendment's "shocks the conscience" standard in that they do not suggest that Ms. Hall intended to harm the Plaintiffs;

3. The Plaintiffs fail to state a civil rights action against the County and the Department in that they do not allege the existence of an unconstitutional custom, policy or practice;

4. The Plaintiffs' non-vicarious liability negligence claims are barred by the immunity provisions of the Maine Tort Claims Act;

5. The County and the Department cannot be held liable for punitive damages for claims arising in tort or for claims asserted pursuant to 5 M.R.S.A. § 4683 or 42 U.S.C. § 1983.

The Court hereby ORDERS that the Defendants' Motion is GRANTED and further ORDERS that the claims against the County and the Department in Counts III, IV and V of the Complaint are hereby DISMISSED with prejudice.

Dated: December 28, 2000 s/ Hon. Thomas E. Delahanty, II
Justice, Superior Court

APPENDIX D — ORDER OF THE MAINE SUPREME JUDICIAL COURT DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION DATED NOVEMBER 19, 2003

STATE OF MAINE

Docket No. Cum-02-467

SUPREME JUDICIAL COURT
Sitting as the Law Court Decision No. 2003 ME 118

MICHELLE NORTON et al.

v.

CUMBERLAND COUNTY et al.

ORDER

Upon motion of the plaintiffs for reconsideration, it is ORDERED that the motion be, and hereby is, DENIED.

Dated: November 19, 2003

For the Court,

s/ Robert W. Clifford
Robert W. Clifford, Associate Justice

APPENDIX E — RELEVANT CONSTITUTIONAL, STATUTORY PROVISIONS AND RULES INVOLVED

United States Constitution

Amendment V

No person shall be. . . deprived of life, liberty, or property, without due process of law . . .

* * *

Fourteen Amendment of the United States Constitution

ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

14 M.R.S.A. § 8104-A

§ 8104-A. Exceptions to immunity

Except as specified in section 8104-B, a governmental entity is liable for property damage, bodily injury or death in the following instances.

* * *

1. Ownership; maintenance or use of vehicles, machinery and equipment. A governmental entity is liable for its negligent acts or omissions in its ownership, maintenance or use of any:

Appendix E

A. Motor vehicle, as defined in Title 29-A, section 101, subsection 42

* * *

14 M.R.S.A. § 8104-B

§ 8104-B. Immunity notwithstanding waiver

Notwithstanding section 8104-A, a governmental entity is not liable for any claim which results from:

* * *

3. Performing discretionary function. Performing or failing to perform a discretionary function or duty, whether or not the discretion is abused and whether or not any statute, charter, ordinance, order, resolution or policy under which the discretionary function or duty is performed is valid or invalid

* * *

14 M.R.S.A. § 8111

§ 8111. Personal immunity for employees; procedure

1. Immunity. Notwithstanding any liability that may have existed at common law, employees

of governmental entities shall be absolutely immune from personal civil liability for the following:

* * *

C. Performing or failing to perform any discretionary function or duty, whether or not the discretion is abused; and whether or not any statute, charter, ordinance, order, resolution, rule or resolve under which the discretionary function or duty is performed is valid

* * *

24 M.R.S.A. § 2054

§ 2054. Emergency and auxiliary lights; sirens; privileges

* * *

4. Right-of-way. An authorized emergency vehicle operated in response to, but not returning from, a call or fire alarm or operated in pursuit of an actual or suspected violator of the law has the right-of-way when emitting a visual signal using an emergency light and an audible signal using a bell or siren.

* * *

5. Exercise of privileges. The operator of an authorized emergency vehicle when responding

to, but not upon returning from, an emergency call or fire alarm or when in pursuit of an actual or suspected violator of the law may exercise the privileges set forth in this subsection. The operator of an authorized emergency vehicle may:

* * *

B. Proceed past a red signal, stop signal or stop sign, but only after slowing down as necessary for safe operation;

* * *

6. Emergency lights and audible signals. The operator of an authorized emergency vehicle who is exercising the privileges granted under subsection 5 shall use an emergency light 2. The operator of an authorized emergency vehicle who is exercising the privileges granted under subsection 5, paragraph[s] B . . . shall sound a bell or siren when reasonably necessary to warn pedestrians and other operators of the emergency vehicle's approach.

7. Duty to drive with due regard for safety. Subsections 4, 5 and 6 do not relieve the operator of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor do those subsections protect the operator from the consequences of the operator's reckless disregard for the safety of others.

* * * *

APPENDIX F — EXCERPTED PETITIONERS' MEMORANDUM OF LAW TO THE MAINE SUPREME JUDICIAL COURT SITTING AS LAW COURT ON APPEAL FROM THE SUPERIOR COURT DATED SEPTEMBER 27, 2002

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Docket No. CUM-02-467

MICHELLE NORTON and JOHN NORTON, JR.

Plaintiffs/Appellants

v.

DEBORAH HALL
COUNTY OF CUMBERLAND
CUMBERLAND COUNTY SHERIFF'S DEPARTMENT

Defendants/Appellees

ON APPEAL FROM THE SUPERIOR COURT,
CUMBERLAND COUNTY

BRIEF OF APPELLANTS

* * *

Appendix F

V. IMMUNIZING THE DEFENDANTS WOULD RESULT IN AN UNCONSTITUTIONAL DEPRIVATION OF THE PLAINTIFFS' RIGHTS.

The gravamen of the Defendants' defense is that they cannot be held liable for their tortious conduct, because they were furthering a public interest. For the reasons stated above, the Plaintiffs dispute this contention. However, if the Defendants' immunity arguments are accepted by this Court, it follows that the Defendants owe the Plaintiffs just compensation for their losses.[10]

The Fifth Amendment to the United States Constitution states in pertinent part, "nor shall private property be taken for public use, without just compensation." *U.S. Const. Amend. V.* The Fourteenth Amendments prohibits a State from depriving "any person of life, liberty, or property, without due process of law." *U.S. Const. Amend. XIV.*

* * *

In this case, the Plaintiffs have suffered grievous injuries to their person and property allegedly in furtherance of the interests of the State. There is no question that the Plaintiffs have been wronged. The Defendants owed the Plaintiffs the duty to use reasonable care when operating motor vehicles on public roadways. There is little question that the Defendants breached this duty and caused damage to the Plaintiffs. *See e.g., Order of July 3, 2002*, at 4, 7, 9, and 10

10. Although the Court below apparently rejected this argument, the Superior Court does not discuss this issue in its *Order of July 3, 2002.*

(noting record support for the conclusion that Defendant Hall was driving negligently). The Plaintiffs have not been offered just compensation or due process. If the grant of summary judgment is upheld, they will be left without a remedy to redress the wrongs they have suffered at the hands of the Defendants.

* * *

VI. THE PLAINTIFFS HAVE PRODUCED SUFFICIENT FACTS TO SUPPORT THEIR CIVIL RIGHTS CLAIMS.

The Plaintiffs have claimed that the Defendants violated the substantive due process rights afforded them by the Constitutions of the United States and the State of Maine. The Superior Court denied these claims finding that there was no evidence that Defendant Hall had acted "maliciously or sadistically." *Order of July 3, 2002*, at 9. Because the Plaintiffs' Constitutional rights can be violated even if the governmental employee was not acting maliciously or sadistically, the superior Court's decision should be reversed. . . .

* * *

APPENDIX G — EXCERPTED PETITIONERS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT HALL'S SECOND MOTION FOR SUMMARY JUDGMENT IN THE MAINE SUPERIOR COURT DATED JANUARY 16, 2002

* * *

IV. IT WOULD BE UNCONSTITUTIONAL TO FIND DEFENDANT HALL ENTITLED TO IMMUNITY.

According to Defendant Hall, she is immune from liability because she was involved in furthering an important governmental objective. Although two young boys lost their lives because of Defendant Hall's actions, she claims that she has no obligation to compensate their estates for their deaths. According to Defendant Hall's strained interpretation, a government official could deprive someone of their life, liberty and property without due process and without providing any compensation to their victims. Defendant Hall's position defies common sense and would be unconstitutional.

The Maine Legislature could not have intended such an absurd and unfair result when it enacted the Maine Tort Claims Act. However, if it did, then the Maine Tort Claims Act would be unconstitutional under both State and Federal law as applied to the facts of this case. This Court is "bound to avoid an unconstitutional construction of a statute if a reasonable interpretation of the statute would satisfy constitutional requirements." *Bagley v. Raymond School Dep't.*, 728 A.2d 127, 132 (Me 1999) *citing Bossie v. State*, 488 A.2d 477, 479 (Me. 1985).

* * * *

APPENDIX H — EXCERPTED PETITIONERS' OPPOSITION TO MOTION TO DISMISS BY CUMBERLAND COUNTY AND CUMBERLAND COUNTY'S SHERIFF'S DEPARTMENT AND INCORPORATED MEMORANDUM OF LAW DATED SEPTEMBER 20, 2000

* * *

III. PLAINTIFFS ARE ENTITLED TO RELIEF ON THEIR CIVIL RIGHTS CLAIMS.

* * *

The County Defendants allowed Deputy Hall to operate motor vehicles under color of law, despite her substandard performance on EVOC testing and an April 1998 accident. Only three months before the accident giving rise to this lawsuit, Deputy Hall was involved in an accident also caused by her excessive speed, in which she totaled her cruiser. Yet, the County did little to investigate the April, 1998 accident, took no disciplinary actions against Deputy Hall, failed to take additional steps to train Deputy Hall in the operation of emergency vehicles and with reckless and deliberate indifference to the safety of the public allowed Hall to continue operating emergency vehicles.

On July 8, 1998 the County's reckless actions led to the deaths of two children and deprived John and Matthew Norton of their Constitutional rights to life, liberty and the pursuit of happiness, specifically protected by the Fifth and

Appendix H

Fourteenth Amendments of the United States and Main Constitutions.[6]

* * *

County of Sacramento et al. v. Lewis, 523 U.S. 833 (1998), cited by County Defendants in support of their argument, does not apply to the case at hand. In *Lewis*, the court decided the specific issue of "whether a police officer violates the Fourteenth Amendment's guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a *high-speed automobile chase aimed at apprehending a suspected offender.*" [Emphasis added.] *Lewis,* at 836. The issue presented to the court in this case is easily distinguishable. In this case, the court is not faced with a high-speed pursuit aimed at apprehending a suspected offender. Instead, the court is faced with the county's failure to prevent a deputy sheriff from recklessly driving to a non-emergency call by exceeding the speed limit by more than 30-56 miles per hour, failing to consistently activate the siren and failing to properly pay attention to the traffic in the road.

* * *

---

6. Although Plaintiffs recognize that the Fourth, Fifth, Sixth and Eighth Amendments of the Constitution do not specifically protect the rights of Plaintiffs on this case, courts have long recognized that the purpose of the Constitution, including the Fourth, Fifth, Sixth and Eighth Amendments is drafted to protect the rights to life, liberty and the pursuit of happiness of our citizens. *See Gulf, Colorado and Santa Fe Railway Company v. Ellis,* 165 U.S. 150, 160 (1897).

Specifically in *City of Canton, Ohio v. Harris et al.*, 489 U.S. 378, 380 (1989) cited by County Defendants, court recognized that governmental entity may be liable under 42 U.S.C. § 1983 for its failure to train employees under certain circumstances. Specifically, the court held that the inadequacy of police training may serve as the basis for Section 1983 liability where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. *Harris* at 388.

* * *

2. Plaintiffs State a Civil Rights Action Against the County and the Department In That They Do Allege the Existence Of an Unconstitutional Custom, Policy Or Practice.

The Complaint alleges a Sheriff's Department history of conduct, which constitutes a "custom, policy or practice," upon which liability can be imposed.

County Defendants cited *City of Oklahoma v. Tuttle*, 471 U.S. 808, 821 (1985), to support their argument that a section 1983 claim against the county must be based on a custom or policy. In this case, there is sufficient evidence of an unconstitutional policy or custom to give rise to a Section 1983 claim.

APPENDIX I — EXCERPTED RESPONDENTS' REPLY MEMORANDUM OF LAW MOTION IN SUPPORT OF MOTION TO DISMISS BY CUMBERLAND COUNTY AND CUMBERLAND COUNTY'S SHERIFF'S DEPARTMENT AND INCORPORATED MEMORANDUM OF LAW DATED SEPTEMBER 20, 2000

* * *

I. The Plaintiffs Have Not Articulated An Actionable Basis For Their Civil Rights Claims.

. . . In arguing that the County Defendants can be held liable for failing to train Ms. Hall, they lose sight of a critical element in civil rights claims: the deprivation of a constitutional right. Obviously, the County Defendants cannot be held liable for an alleged lack of training that is not causally related to an event that allegedly deprived an individual of some constitutional right. *City of Canton v. Harris,* 489 U.S. 378, 385, 109 S.Ct. 1197, 1203 (1989) ("our first inquiry in any case alleging municipal liability under § 1983 is the question whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation.").

The Plaintiffs' Fourteenth Amendment claim is based on the allegation that Ms. Hall operated her vehicle in such a manner as to violate their right to substantive due process. The United States Supreme Court's scholarly opinion in *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S.Ct. 1708 (1998) explored the limitations of the substantive due process doctrine in the context of law enforcement activities. In particular, the Court elaborated on the "shocks the conscience" standard applicable to substantive due process claims.

* * *

Notwithstanding the Plaintiffs' myopic reading, *Lewis* does indicate that the Plaintiffs fail to present a viable substantive due process claim. Like the officer in *Lewis*, Ms. Hall was faced with a situation that required an immediate judgment call on her part. While the Plaintiffs may disagree with her response, this allegation does not and cannot obviate the fact that Ms. Hall did make a judgment call in circumstances where deliberation was not an option. Therefore, the rule articulated by *Lewis* is directly applicable to this case: "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.'" *Id.* at 853, 118 S.Ct. at 1720 (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)). . . .

* * *

. . . *Id.* at 853, 118 S. Ct. at 1720 (quoting *Daniels v. Williams,* 474 U.S. 327, 332 (1986)). Since the Plaintiffs cannot demonstrate a viable substantive due process claim arising out of the automobile accident – the event they allege deprived them of their due process rights – they have no claim against the County Defendants for failure to train. *City of Los Angeles v. Heller,* 475 U.S. 796, 799, 106 S.Ct. 1571, 1573 (1986) ("If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have authorized the use of constitutionally excessive force is quite beside the point.").

(2)

No. 03-1174

Supreme Court, U.S.
FILED
MAR 22 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MICHELLE NORTON and JOHN NORTON, JR.,

Petitioners,

v.

DEBORAH HALL, COUNTY OF CUMBERLAND and CUMBERLAND COUNTY SHERIFF'S DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. WALL, III, ESQ.
Counsel of Record for Respondents Cumberland County and Cumberland County Sheriff's Department

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether the Petitioners waived their argument concerning governmental entity liability under 42 U.S.C. § 1983 by failing to brief the issue of custom, policy or practice before the Maine Supreme Judicial Court?

2. Whether a claim of governmental entity liability under 42 U.S.C. § 1983 can be maintained when there has been a conclusive finding that constitutional violation occurred?

3. Whether an emergency response by a law enforcement officer requires "fast action" and a balancing of competing interests such that it is measured by the "intent to harm" standard for the purposes of substantive due process?

4. Whether the application of discretionary-function immunity under Maine statutory law gives rise to a claim under the Due Process or Just Compensation Clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

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COUNTY RESPONDENTS' BRIEF IN OPPOSITION

Respondents Cumberland County and Cumberland County Sheriff's Department ("the County Respondents") respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the Decision of the Maine Supreme Judicial Court issued on September 30, 2003, which is reproduced in Appendix A to the Petition at page 1a. The Petitioners mount a two-pronged assault on the Maine Supreme Judicial Court's decision, one that relates to a claim that was plead in the Complaint and one that exists outside the Complaint. As neither approach generates an issue worthy of review by this Court, the Court should reject the Petitioners' request.

The Petitioners waived their substantive due process claim against the County Respondents by failing to brief the issue on appeal. In any event, the Maine Supreme Judicial Court evaluated the Petitioners' substantive due process claim under the correct legal standard. Respondent Deborah Hall's emergency response to a call for assistance required her to make instant judgments in tense and uncertain circumstances. This Court has already held, in a similar context, that nothing short of an intent to harm on the part of a public official will give rise to liability under the rubric of substantive due process. Since there is nothing in the record below to suggest that Respondent Hall intended to harm the Petitioners' family members, the Maine Supreme Judicial Court properly upheld judgment in the Respondents' favor.

The Petitioners' alternative and unplead argument – that the Maine Tort Claims Act is unconstitutional – is unavailing. Assuming the argument was properly preserved

below, Maine's policy decisions about how to define the limits on state tort actions against governmental officials and entities are paramount to "any discernable federal interest." *Martinez v. State of California*, 444 U.S. 277, 282 (1980). The immunity provisions do not deprive the Petitioners of any property interest without due process, nor do they constitute a taking of property for public use without just compensation.

STATEMENT OF THE CASE

An automobile accident that occurred on July 8, 1998 in Raymond, Maine precipitated this litigation. That evening, Respondent Hall was operating a Cumberland County Sheriff's Department ("Department") cruiser in her capacity as a deputy sheriff. (Cumberland County and Cumberland County Sheriff's Department's Resp. Req. Admission ¶ 7 (hereinafter "CC Resp. Req. Admit. ¶ ___")). She received a call from Department dispatch indicating that she should proceed to an address in Casco to deal with an "out of control" six-year-old. (Dion Dep. Exh. 2). A supervisor also responded to the call. (Hall Dep. at 171, line 25, and 172, lines 1-2). Respondent Hall was told that a rescue unit would be "standing by." (Dion Dep. Exh. 2).

Based on her experience, Respondent Hall believed that the involvement of rescue indicated the possibility of personal injury. (Hall Dep. at 166, line 25, and 167, lines 1-9). In fact, she reasoned that rescue probably would not have known of the situation unless someone had called that department about some type of injury. *Id.* at 167, lines 20-25, and 168, line 1. Respondent Hall further understood that rescue was waiting for the Department to

secure the scene before it would respond to the potential injury. *Id.* at 169, lines 1-6.

Respondent Hall was familiar with the location of the call based on prior experience with one of the residents. *Id.* at 171, lines 20-23. She had been directly involved in at least four calls concerning this individual and was aware of a few others. *Id.* at 223, lines 19-21. On at least one occasion, the call involved a complaint of assault. *Id.* at 224, lines 4-6. Other calls involved disturbances and combativeness. *Id.* at 224, lines 16-18.

Overall, her knowledge and experience indicated that an emergency response was required:

> Q. Okay. In fact, you had no information to believe that there was personal injuries that had occurred at the scene, am I correct.
>
> A. Other than what I explained as to having a six-year-old child up at that time of night and knowing the name of the residence that I was going to and their past history and the fact that rescue was standing by and was not going to go to the residence until I arrived there along with the fact that the supervisor was also responding to the scene as well as myself as a second unit that led me to believe that there was much more to the story than a six-year-old that for some reason two parents can't control at 10:00 at night.

Id. at 171, lines 20-25, and 172, lines 1-4.

She started out from a convenience store in Windham headed toward Casco on Route 302. *Id.* at 157, lines 10-12. She was operating with lights and siren from the time she started out. *Id.* at 162, lines 4-10. She estimated her speed

in the 50-mph zone to be approximately 70 mph. *Id.* at 160, lines 10-17. She does not recall turning her siren off at any time. *Id.* at 162, lines 15-18.[1]

As Respondent Hall approached a dirt road that connected to Route 302, she heard her call number broadcast over the radio. (Hall Dep. at 180, lines 7-12). The cars in front of her all appeared to be moving to the right shoulder. *Id.* at 174, lines 8-13. She reached down to grasp a microphone that she had in her lap to respond to the call while she continued to watch the road. *Id.* at 180, lines 9-12. At this moment, she noticed one car cross in front of her path as she was passing. *Id.* at 174, lines 14-20. That was the Petitioners' vehicle. *Id.* at 174, lines 21-22. She applied her brakes and attempted to maneuver left. *Id.* at 176, lines 19-25. Despite these efforts, she struck the Petitioners' vehicle. *Id.* at 180, lines 23-25.

As of July 8, 1998, the Department had a field services manual that addressed the operation of vehicles. (Dion Dep. at 97, lines 1-4 & Exh. 4). The specific manual section on operation was part of a general order, which offers guidelines to assist officers in exercising their discretion:

> Unlike rules and regulations, a violation of a general order may result in administrative discipline. General orders constitute a guide to behavior in given situations. Deputies may depart from

[1] For the purposes of summary judgment, the Maine Superior Court and the Maine Supreme Judicial Court credited the Petitioners' allegations that Respondent Hall did not have her siren on in the moments before impact, and that her speed prior to impact was at least 86 miles per hour in a 55 mile per hour speed zone. (Appendix at 41-42 nn.7 & 8, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)).

> general orders if, in their professional judgment, the situation warrants. Deputies must be prepared, however, to justify their actions.

Id. Exh. 6 (¶ III(D)(2)).

The Petitioners presented no evidence on appeal of any deficiency in the training of patrol officers by the County Respondents. In their "statement of the case" to the Maine Supreme Judicial Court, the Petitioners did not even mention training by the County Respondents. (Brief of Appellants at 1-2, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). Further, in the body of their substantive due process argument, the Petitioners did not refer even once to a custom, policy or practice of the County Respondents or to inadequate training. (Brief of Appellants at 21-24, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)).

The record does not justify the Petitioners' statement that Respondent Hall was traveling "in excess of 50 miles per hour over the posted speed limit," nor does it support the suggestion that Respondent Hall was not using her emergency lights during her response. Moreover, Respondent Hall was not told two minutes before the accident occurred that there was no emergency. (Appendix at 103, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). In response to a query made to dispatch about injuries, she was informed that "[a]t this point we're only aware of the behavioral problem." (Appendix at 186, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). This information from dispatch, along with the other information in her possession, did not suggest to Respondent Hall that an emergency response was inappropriate or unnecessary. (Appendix at 103, *Norton v. Hall*, 834 A.2d 928 (Me. 2003) (Hall Dep. at 171, lines 20-25, and 172, lines 1-4)). Quite the contrary was true. *Id.*

REASONS FOR DENIAL OF THE WRIT

The Petitioners have not articulated a viable basis for review by this Court. Assuming the claim against the County Respondents was properly preserved, the Maine Supreme Judicial Court applied the correct standard to the Petitioners' substantive due process claim against the Respondents. Absent a constitutional violation by Respondent Hall, there is no basis for civil rights liability against the County Respondents. By failing to address a broader conception of the County Respondents' liability in their briefs to the Maine Supreme Judicial Court, the Respondents have waived the argument. Finally, contrary to the Petitioners' suggestion, the Maine Tort Claims Act is not unconstitutional. The discretionary function immunity provisions of the Act – as interpreted by the Maine Supreme Judicial Court – define whatever property interest may exist in the Petitioners' tort cause of action. So defined, these provisions do not transgress the Due Process or Just Compensation Clauses of the Fifth and Fourteenth Amendments.

This Court should decline to issue a Writ of Certiorari.

I. THE PETITIONERS HAVE NOT PRESERVED THEIR CIVIL RIGHTS CLAIMS AGAINST THE COUNTY RESPONDENTS SUCH THAT CERTIORARI REVIEW WOULD BE APPROPRIATE.

This Court has consistently maintained that it would be improper to grant a writ of certiorari to review an issue that was not preserved below. For example, in *City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) (per curiam), the Court discharged a writ of certiorari as improvidently granted on the grounds that the petitioner had

failed to interpose appropriate objections and subsequently failed to brief the relevant issues to the circuit court of appeals. In that context, the Court stated: "We ordinarily will not decide questions not raised or litigated in the lower courts." *Id.* at 259 (citing *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957)). *See also City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989) (declining to consider a claim of municipal custom that was not passed on by the circuit court of appeals).

The Petitioners failed to preserve the issue of whether the County Respondents maintained an unconstitutional custom, policy or practice related to supervision or training of officers. Upon a motion to dismiss filed by the County Respondents, the Maine Superior Court dismissed the Petitioners' civil rights claim against the County Respondents on the grounds that the Petitioners failed to allege the existence of an unconstitutional custom, policy or practice. (App. C at 34a). Thereafter, the issue of the County Respondents' civil rights liability was not addressed by the Maine Superior Court. (App. B at 23a n.2 (noting that the civil rights claim against the County Respondents had been dismissed)).

In their appeal to the Maine Supreme Judicial Court, the Petitioners failed to challenge the dismissal of the civil rights claim against the County Respondents. The Petitioners did not present any arguments to suggest that dismissal was improper, nor did they present any facts to establish the existence of *any* custom, policy or practice with regard to training or supervision – let alone a custom, policy or practice that reflected deliberate indifference.

The Petitioners' abandonment of their civil rights claim against the County Respondents is apparent from

the arguments that they made to the Maine Supreme Judicial Court. The Petitioners' only allusions to the County Respondents pertaining to civil rights claims were a general allegation that "the Defendants" violated the Petitioners' substantive due process rights and a suggestion that "it was error to grant summary judgment to the Defendants."[2] (Brief of Appellants at 21 and 23, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). As the Petitioners' brief reflects, the general allegation was made in the context of arguing that the summary judgment order – which addressed the Petitioners' civil rights claim against Respondent Hall only – was based upon an erroneous legal standard. (Brief of Appellants at 21, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). The Petitioners focused their argument entirely upon the actions of Respondent Hall. (Brief of Appellants at 22-23, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). They did not once argue that the County Respondents were "deliberately indifferent" in the training or supervision of officers. (Brief of Appellants at 21, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). They concluded their argument on the civil rights issue by stating: "On these facts, a jury could find that *Defendant Hall's* actions violated the Plaintiffs' Constitution rights." (Brief of Appellants at 23, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)) (emphasis added).

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[2] The latter blanket statement deserves no comment since it is simply loose language based on an inaccurate premise: that the County Respondents were awarded summary judgment on this issue. As the Maine Superior Court's summary judgment decision and order reflects, summary judgment was granted to Respondent Hall only, as the civil rights claims against the County Respondents had already been dismissed. (App. B at 23a n.2 and 32a).

As the Petitioners did not preserve below the issue of municipal liability under 42 U.S.C. § 1983, this Court should decline to issue a writ of certiorari.

II. THE PETITIONERS HAVE NOT ARTICULATED A LEGITIMATE BASIS FOR IMPOSING CIVIL RIGHTS LIABILITY ON THE COUNTY RESPONDENTS.

Without waiving the preceding argument in this Opposition, the Court should refuse to grant certiorari review of the civil rights claim against the County Respondents because as a matter of law there was no evidence of a civil rights violation. As the County Respondents argue below, the Maine Supreme Judicial Court accurately applied the correct legal standard in assessing whether Respondent Hall's conduct amounted to a constitutional violation. *See infra* at 10. This Court has held that absent an underlying constitutional violation, there is no basis in which to hold a governmental entity liable: "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (emphasis in original). The circuit courts of appeals have consistently applied this well-established principle of Section 1983 jurisprudence. *See Trigalet v. City of Tulsa*, 239 F.3d 1150, 1154-55 (10th Cir. 2001), *cert. denied*, 516 U.S. 932 (1995) (collecting cases from the United States Court of Appeals for the First, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits).

The Petitioners' attempt to generate a controversy regarding this established doctrine of law is unavailing. First, the Petitioners never argued below that the County

Defendants' civil rights liability could or should be assessed without reference to whether Respondent Hall's actions violated due process, and their failure to do so constitutes a waiver. *See City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) (per curiam). Second, the competing viewpoint – espoused by the United States Court of Appeals for the Third Circuit in *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir.), *on reh'g en banc*, 22 F.3d 1296 (1994) – is demonstrably incompatible with Supreme Court precedent because it fails to incorporate the distinction between the standard of municipal liability for failure to train and the predicative requirement of a constitutional violation. *See Evans v. Avery*, 100 F.3d 1033, 1039-40 (1st Cir. 1996) (rejecting the holding of *Fagan* because the panel "improperly applied the Supreme Court's precedent"). Moreover, *Fagan* is dubious authority even within the Third Circuit. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 n.13 (3d Cir. 1995) (questioning the analysis contained in the *Fagan* panel opinion). Third, the record before the Maine Supreme Judicial Court does not support any claim for failure to train. There are simply no record facts upon which the Petitioners can argue that the County Respondents maintained a custom, policy or practice with regard to officer training that was both deliberately indifferent and the moving force behind a constitutional violation. For all of these reasons, the Court should refuse to issue a writ of certiorari.

III. THE MAINE SUPREME JUDICIAL COURT APPLIED THE CORRECT LEGAL STANDARD TO THE PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM.

Without waiving the preceding arguments in this Opposition, the Court should also decline to review the

Petitioners' substantive due process claim because the Maine Supreme Judicial Court applied the correct legal standard. In *County of Sacramento v. Lewis*, 523 U.S. 833, 854 (1998), this Court ruled that in the context of vehicle pursuits by law enforcement officers, a plaintiff would have to demonstrate an actual intent to injure to establish a substantive due process violation. The facts of *County of Sacramento* are similar to those in the instant case: The plaintiff in *County of Sacramento* was the estate of a young man who was riding on the back of a motorcycle that fled from two county deputies. The chase began because the motorcycle operator refused to stop for the deputies. The vehicles raced through a residential neighborhood for 75 seconds over the course of 1.3 miles, at times attaining speeds of up to 100 miles per hour. The pursuit ended tragically when the motorcycle tipped over and a pursuing cruiser, which was following at a distance of approximately 100 feet, hit the fallen vehicle.

The United States Court of Appeals for the Ninth Circuit vacated summary judgment for the pursuing officer. The Ninth Circuit concluded that the officer was not entitled to qualified immunity because the plaintiff generated an issue of fact as to whether the officer violated the Fourteenth Amendment by operating his vehicle in a deliberately indifferent manner. The Ninth Circuit noted that the officer violated department regulations pertaining to police pursuits in conducting the chase and emphasized that the officer was required to consider whether the risks presented in continuing the chase were justified in light of the danger presented by two youths who failed to stop for the officer.

This Court reversed the judgment of the Ninth Circuit and held as a matter of law that the plaintiff could not

establish a viable substantive due process claim. While the Court observed that the level of culpability necessary to raise an issue of fact might vary depending upon the type of action by the governmental official, it emphasized that "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.'" *Id.* at 853 (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)). The Court concluded by holding: "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Id.* at 854.

Respondent Hall's alleged conduct in responding to the call for assistance does not meet the standard for liability set forth in *County of Sacramento*. There is no allegation in the Complaint concerning Respondent Hall's intent to harm. Moreover, Respondent Hall made a split-second decision about the necessary course of action in circumstances that she perceived to be an emergency. While the Petitioners continue to suggest that her decision was unwarranted, they cannot demonstrate a "harmful purpose" necessary to prove a substantive due process violation.[3] To paraphrase Justice Souter in *County of Sacramento*, regardless of whether Respondent Hall's

[3] Moreover, the Petitioners' suggestion that Respondent Hall was not confronted with an immediate need to act ignores the reality of the situation. While the Petitioners contend that Respondent Hall made a poor decision to start an emergency response, it is indisputable that she needed to exercise instant judgment.

behavior offended the reasonableness held up by tort law or the balance struck in the County's Standard Operating Procedures, it does not "shock the conscience" such that the Petitioners can recover damages pursuant to Section 1983.

The Petitioners' suggestion that a lesser level of culpability should apply to Respondent Hall's conduct is inconsistent with established law. In *County of Sacramento*, this Court was presented with variables that are similar to those in the instant case. While Respondent Hall was reacting to a call for assistance rather than a motorist who had failed to stop when signaled, she was motivated (like the officer in *County of Sacramento*) with the instinct to do her job. Her experience with the location of the call and the peculiarities of the call itself – the fact that a County officer would be brought in to deal with an "out of control" child, the hour of the call, the fact that rescue was standing by, and the fact that more than one officer was responding – led her to the instantaneous conclusion that immediate and rapid action was required. Moreover, like the accident involving the Petitioners and Respondent Hall, the accident at issue in *County of Sacramento* did not occur immediately after the officer began the operation of his vehicle – as the Ninth Circuit suggested, the officer in *County of Sacramento* had sufficient time during the pursuit to consider whether he should break off his pursuit. In short, the considerations in *County of Sacramento* are virtually identical to those in this case and the Maine Supreme Judicial Court properly applied the "shocks the conscience" standard.

IV. THE MAINE TORT CLAIMS ACT DOES NOT VIOLATE THE DUE PROCESS OR JUST COMPENSATION CLAUSES OF THE UNITED STATES CONSTITUTION.

Although the Petition lacks clarity on this point, it appears that the Petitioners are claiming that the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101 to 8118 (2003), is unconstitutional. With regard to the County Respondents, it is doubtful whether the Petitioners preserved this issue below. Notably, the Petitioners did not base their opposition to the County Respondents' summary judgment motion on the ground that the discretionary-function immunity provision was unconstitutional. While the Petitioners did present some argument on this issue in response to Respondent Hall's summary judgment motion, the Maine Supreme Judicial Court did not find it necessary to address the issue.

Assuming (without admitting) that the Petitioners' argument was preserved below, it fails on its own merits. The Maine Tort Claims Act does not offend either procedural due process or the Just Compensation Clause.

A. To The Extent It Was Properly Preserved, The Petitioners' Procedural Due Process Argument Fails On Its Own Merits.

The Petitioners appear to argue that they have been deprived of their "causes of action" – presumably tort causes of action – because of the Maine Supreme Judicial Court's interpretation of the Maine Tort Claims Act. To make out a violation of procedural due process, the Petitioners would have to show that they were deprived of a constitutionally protected property interest without the

benefit of notice or an opportunity to be heard. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The Petitioners can demonstrate neither.

It is doubtful that they have a constitutionally-protected property interest in their tort actions. Property interests, in this context, are created and defined by state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). While this Court has held that causes of action can sometimes amount to a "property interest," it has also suggested that state law can define or delimit causes of action such that they do not acquire the status of an interest that is constitutionally protected. *See Martinez v. California*, 444 U.S. 277, 282 n.5 (1980). Other courts have expressly adopted this latter analysis. *See, e.g., Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441, 444 (5th Cir. 1991). As Maine law does not permit tort claims against governmental entities or their employees for injuries arising out of discretionary acts, the Petitioners could not have a protected property interest in them. *See Grimes*, 930 F.2d at 444.

In any event, the Petitioners could not demonstrate that they were denied process due them. It may be true that the Maine Tort Claims Act prevents them from pursuing claims against the Respondents. However, as this Court has observed, legislative action by a state that affords immunity to governmental entities does not transgress the Due Process Clause:

> Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the

> wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law.

Martinez, 444 U.S. at 281-83. *See also Logan*, 455 U.S. at 432 ("Of course, the State remains free to create substantive defenses or immunities for use in adjudication – or to eliminate its statutorily created causes of action altogether – just as it can amend or terminate its welfare or employment programs.") (citing *Martinez*).

The Petitioners' reliance on *Parratt v. Taylor*, 451 U.S. 527 (1981) is misplaced. The Maine Tort Claims Act – the "state action" that the Petitioners maintain deprived them of their causes of action – does not represent a random and unauthorized action like the conduct at issue in *Parratt*. Rather, as *Martinez* and *Logan* indicate, it embodies a policy determination enacted into law through the legislative process that adjusts the contours of tort law in Maine. No further process is due: "[The plaintiffs] had plenty of opportunity to contest the sovereign immunity scheme during the legislative process. The legislature provided all the process that was due." *See Grimes*, 930 F.2d at 444 (citing *Logan*, 455 U.S. at 432-33).

B. To The Extent It Was Properly Preserved, The Petitioners' Just Compensation Argument Fails On Its Own Merits.

The Fifth Amendment is designed, in relevant part, to prevent inverse condemnation of "property interests" by the government without just compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Therefore,

the observations above as to whether causes of action that are barred by state law constitute protected "property interests" apply with equal force to a Just Compensation Clause issue. *See Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996) (observing that "property rights protected by the Fifth Amendment are created and defined by state law") (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)). In fact, courts have held that "property interests" in other contexts do not necessarily implicate the protections of the Just Compensation Clause. As the United States Court of Appeals for the Fourth Circuit has explained:

> While real property and other tangibles are commonly subject to "purchase" by the state as a means of compensation, other forms of property interests – though constitutionally protected – are not normally so conceived. Scott's entitlement to a permit is of this latter variety.

Scott v. Greenville County, 716 F.2d 1409, 1421 n.20 (4th Cir. 1983) (citing *Maher v. City of New Orleans*, 516 F.2d 1051, 1065 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). *Accord Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 & n.6 (11th Cir. 1996).

The Petitioners' property – tort causes of action – is not the type of interest that the Just Compensation Clause is designed to protect. The causes of action – which are inchoate interests that are not vested – are not amenable to sale or acquisition by a governmental entity like an interest in real property. Moreover, to suggest that a governmental entity is required to pay just compensation for such claims even though the entity is immune by state law is, in essence, to eviscerate the immunity itself. There is no authority for such a sweeping derogation of state law.

In addition, the calculus for determining when regulation goes "too far" for the purposes of the Just Compensation Clause is incompatible with the Petitioners' position. As this Court noted recently, the analysis of alleged "regulatory takings" involves "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The Petitioners' just compensation argument is ill-suited for such an analysis for two reasons. First, tort claims are not the kind of property in which a person has any investment-backed expectations. Second, the character of the legislative action in this case was the regulation of tort claims under Maine law – and not the acquisition of property for public use. Given the significant public policy determination by the Maine Legislature to afford discretionary-function immunity, the Petitioners' interest in pursuing tort claims fails to generate a constitutional issue.

CONCLUSION

For the reasons discussed above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 03-1174

IN THE

Supreme Court of the United States

MICHELLE NORTON and JOHN NORTON, JR.,

Petitioners,

v.

DEBORAH HALL
COUNTY OF CUMBERLAND
CUMBERLAND COUNTY SHERIFF'S DEPARTMENT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MAINE SUPREME JUDICIAL COURT

BRIEF FOR RESPONDENT DEBORAH HALL

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QUESTIONS PRESENTED

I. WHETHER IMMUNITY PROVISIONS OF MAINE'S TORT CLAIMS LAW IMPLICATE THE DUE PROCESS CLAUSE OR THE JUST COMPENSATION CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

II. WHETHER THE "SHOCKS THE CONSCIENCE" STANDARD APPLIES TO A SUBSTANTIVE DUE PROCESS CLAIM WHERE THE DEFENDANT POLICE OFFICER WAS ENGAGED IN AN EMERGENCY RESPONSE REQUIRING QUICK ACTION WITH NO OPPORTUNITY FOR DELIBERATION?

III. WHETHER A REASONABLE POLICE OFFICER WOULD HAVE KNOWN, IN 1998, THAT A HIGH SPEED EMERGENCY RESPONSE TO A CALL INVOLVING THE WELFARE OF A SIX YEAR OLD CHILD WOULD VIOLATE PETITIONERS' SUBSTANTIVE DUE PROCESS RIGHTS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION?

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STATEMENT OF THE CASE

Petitioners' Statement of the Facts is so selective and skewed as to require Respondent Hall to address what amount to misstatements of fact, by omission. *See* Supreme Court Rule 15(2).

On July 8, 1998, Respondent Hall received a call from dispatch requesting her to respond to a call for assistance involving an out of control six year old child. Deposition of Deborah Hall, pp. 156-57 (hereafter "Hall dep., p.__").[1] Hall was told that "rescue is standing by – would be standing by until my arrival." Hall dep., p. 168. Based upon her experience, Hall believed that there was a serious emergency involving the welfare of a six year old child which required her immediate presence at the scene before the rescue unit would respond. Hall dep., p. 166. Hall believed that rescue personnel knew of the situation and believed that rescue would not respond until she reached the scene and secured the scene. Hall dep., pp. 167, 169. Hall was familiar with the location of the call based upon her prior experience in responding to calls both at that residence and in dealing with a particular individual who resided there. Hall dep., pp. 171, 223-24. When Hall had previously responded to the location in question, the calls involved physical violence, alcohol, and general combativeness. Hall dep., p. 224. Based upon all of this information, Hall believed that there was an emergency involving the welfare of a six year old child which required her immediate presence before the rescue unit would respond to assist the child. Hall dep.,

1. Petitioners did not include in the appendices to the Petition those portions of the record cited herein. Each reference to the record herein was properly a part of the record below.

p. 166. Hall's supervisor also responded to the call on an emergency basis. Hall dep., pp. 171-72.

Hall used both her emergency lights and siren when responding to the call. Hall dep., p. 162. State law only requires use of a siren "when reasonably necessary to warn . . . other operators of the vehicle's approach." 29-A M.R.S.A. § 2054(6). Hall had been trained to silence her siren when receiving radio transmissions in order to ensure clear communications. Hall dep., pp. 123-24. As Hall engaged in her response, she received the beginning of a radio transmission from dispatch. Hall dep., p. 180. While keeping her eyes on the road, Hall reached to her lap to pick up her radio microphone in order to respond to the transmission from dispatch. Hall dep., p. 180. She does not recall whether or not she exercised her discretion to silence her siren at any point in this particular emergency response. Hall dep., pp. 123-24. At the same moment, Petitioners' vehicle made a left hand turn in front of Hall. Hall dep., p. 174. Hall attempted evasive maneuvers to avoid the accident, but was unsuccessful. Hall dep., p. 180.

Hall had and exercised the discretion to initiate an emergency response. *Cumberland County Sheriff's Office Field Services Manual*, General Order 2-17(B)(C)(1); *Deposition of Mark Dion, Sheriff of Cumberland County,* pp. 99-102. Based upon the totality of the circumstances, Hall believed that an emergency response was required: . . .

> What I explained as to having a six year old child up at that time of night and knowing the name of the residence that I was going to and their past history and the fact that rescue was standing by and was not going to go to the residence until I

> arrived there along with the fact that the supervisor was also responding to the scene as well as myself as a second unit [,] that led me to believe that there was much more to the story than a six year old that for some reason two parents can't control at 10:00 at night.

Hall dep., pp. 171-72.

REASONS FOR DENYING THE PETITION

I. THE IMMUNITY PROVISIONS OF THE MAINE TORT CLAIMS ACT DO NOT RENDER THE ACT UNCONSTITUTIONAL UNDER A PROCEDURAL DUE PROCESS ANALYSIS OR UNDER THE TAKINGS CLAUSE.

Petitioners contend that they were deprived of property interests without compensation or post deprivation remedy, and that the eventual absence of a remedy under the Maine Tort Claims Act renders that Act unconstitutional. Petitioners apparently misapprehend the *Parratt-Hudson* doctrine and argue unpersuasively that the court's holdings in *Parratt v. Taylor*, 451 U.S. 527 (1991) and *Hudson v. Palmer*, 468 U.S. 517 (1984), render the Act unconstitutional in light of its immunity provisions. *See* App. E, pp. 38a-39a. The fundamental flaw in Petitioners' invocation of the *Parratt-Hudson* doctrine is that the doctrine is defensive in nature. Specifically, it is used to defeat procedural due process claims under 42 U.S.C. § 1983 by demonstrating the existence of an adequate remedy at state law. *Parratt v. Taylor*, 451 U.S. 527 (1981); *Augustine v. Doe*, 740 F.2d 322, 329 (5th Cir. 1984). The doctrine is also inapplicable here because there is no viable procedural due process claim,

because there was no random and unauthorized conduct, and because Maine's tort claim law provides an adequate remedy.[2]

A. *The Parrott-Hudson Doctrine Applies Only To Procedural Due Process Claims.*

The *Parratt-Hudson* doctrine applies only to procedural due process claims. *Zinermon v. Burch*, 494 U.S. 113, 129 (1990). It is difficult to appreciate a viable procedural due process claim here. The touchstone of such a claim is not the deprivation itself, but that the deprivation occurred without an adequate remedy in the form of some process to safeguard against an improper deprivation. *See City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 710 (1999); *Zinermon v. Burch*, 494 U.S. at 125. As will be demonstrated below, the statutory scheme which Petitioners attack itself provides an adequate remedy. As a threshold matter, however, because of the availability of a *substantive* due process claim, immunity provisions of the state law which ultimately defeat Petitioners' state *tort* claims, do not procedurally deprive Petitioners of an opportunity to present constitutional claims. *See e.g. County of Sacramento v. Lewis*, 523 U.S. 833 (1998); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Woodson v. North Carolina*, 428 U.S. 280 (1976). There is no procedural due process issue here, and Petitioners reliance on *Parratt-Hudson* is ill-founded.

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2. Petitioners blend concepts of procedural due process with notions of unconstitutional takings absent just compensation. *See* Petition at 10-11. The resulting amalgam blurs these distinct constitutional principles to the point that they are barely recognizable. To the extent that Petitioners contend that the lack of a post deprivation remedy is an issue with respect to their argument under the takings clause, then the discussion below, *infra* at section (I)(C), p. 5, with respect to the adequacy of the remedy afforded by the state statutory scheme is applicable both to the procedural due process considerations under the *Parratt-Hudson* doctrine and to the takings claim.

B. *The Parrott-Hudson Doctrine Requires "Random And Unauthorized" Conduct.*

Petitioners also fail to recognize that the *Parratt-Hudson* doctrine only applies when there has been random and unauthorized conduct. *Zinermon v. Burch*, 494 U.S. 113 (1990); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). The *Logan* court emphasized that the *Parratt-Hudson* doctrine is limited to cases which involve "a random and unauthorized act by a state employee . . . , not a result of some established state procedure." *Logan v. Zimmerman Brush Co.*, at 435-36. To the extent that Petitioners claim a property interest in a cause of action against Respondent Hall, the deprivation of that interest was pursuant to statute, and was not a random or unauthorized act. And if Petitioners' claim is for deprivation of their decedents' interest in "life" as a result of Respondent Hall's actions, those actions were expressly authorized by statute, 30-A M.R.S.A. §§ 451(13), 452; 29-A M.R.S.A. § 2054, and by departmental regulation. *See supra*, p. 2.

C. *Maine's Tort Claim Law Provides An "Adequate" Remedy, And States Retain The Authority To Place Limitations On Property Rights Which They Create.*

1. Maine's tort claims statute provides an "adequate" remedy.

Even if the *Parratt-Hudson* doctrine were to apply, Petitioners were not left without an adequate state remedy. This Court has previously recognized that aspects of a State statutory tort scheme which provide immunity defenses do not necessarily render the remedy inadequate, even though they may work to deny recovery in individual cases. In *Daniels v. Williams*, 474 U.S. 327 (1986), Justice Stevens expressed the view

that immunity under a state tort statute is not necessarily unconstitutional:

> Those aspects of a State's tort regime that defeat recovery are not constitutionally invalid, so long as there is no fundamental unfairness in their operation. Thus, defenses such as contributory negligence or statutes of limitations may defeat recovery in particular cases without raising any question about the constitutionality of a State's procedures for disposing of tort litigation. Similarly, . . . the mere fact that a State elects to provide some of its agents with a sovereign immunity defense in certain cases does not justify the conclusion that its remedial system is constitutionally inadequate.

Daniels v. Williams, 474 U.S. 327, 342 (1986) (Stevens, J. concurring). While there may be a meaningful distinction between an immunity defense that is a *per se* bar to all claims and an immunity defense that might preclude certain claims on a case by case basis, where the latter category of immunity defenses is at issue – as it is here – this Court's precedent indicates that notwithstanding the immunity defense, the statutory scheme nevertheless provides an adequate remedy.

Most lower courts confronted with this issue have also held that the mere fact that a state law immunity provision might deprive a plaintiff of a potential remedy does not render the state remedy inadequate or unconstitutional. *Easterhouse v. Felder*, 879 F.2d 1458, 1475 (7th Cir. 1989) (*en banc*) (availability of qualified immunity defense does not render state remedy inadequate), *vacated and remanded*, 494 U.S. 1014 (1990); *Taylor v. Leadbetter*, 791 F.2d 881, 884

(11th Cir. 1986), *cert denied*, 489 U.S. 1065 (1989); *National Communication System v. Michigan Pub. Serve. Comm'n*, 789 F.2d 370 (6th Cir. 1986) (availability of good faith immunity did not render state remedy inadequate), *cert denied*, 479 U.S. 852 (1986); *Juncker v. Tinney*, 549 F. Supp. 574 (D.Md. 1982) (qualified immunity does not render state remedy inadequate).

2. States retain the authority to create property interests, and to place rational, policy based limitations on those interests.

(a) Maine's tort immunity law is not "state action" causing a deprivation of life.

In *Martinez v. California*, 444 U.S. 277 (1980), the court addressed a challenge to a state statutory tort scheme which provided immunity to the state actor. The court considered whether the immunity provision might be unconstitutional if it caused the deprivation. In rejecting the due process challenge to the statute, the court concluded that the immunity provision did not render the state tort law violative of the due process clause by virtue of the fact that the immunity provision might have marginally increased the likelihood of a deprivation. The *Martinez* court wrote that:

> This statute merely provides a defense to potential state tort-law liability. At most, the availability of such a defense may have encouraged members of the parole board to take somewhat greater risks of recidivism in exercising their authority to release prisoners than they otherwise might.

Martinez v. California, 444 U.S. 277, 281 (1980). Here, as in *Martinez*, the fact that Defendant Hall was granted

immunity from liability arising from discretionary acts might arguably have diminished her inhibition to operate her vehicle at a high rate of speed. The *Martinez* court recognized that "a legislative decision that has an incremental impact on the probability that death will occur in any given situation . . . cannot be characterized as state action depriving a person of life . . .". *Id.* at 281. There is no colorable argument that the immunity provision caused an unconstitutional deprivation of life.

(b) Maine's tort immunity law does not constitute an unconstitutional statutory deprivation of a state created property interest in a cause of action.

The *Martinez* court also addressed the alleged due process violation arising not from the taking of a life, but from the denial of a cause of action:

> Nor can a statute be characterized as an invalid deprivation of property. Arguably, the cause of action for wrongful death that the State has created is a species of "property" protected by the due process clause. In that hypothesis, the immunity statute could be viewed as depriving the plaintiffs of that property interest insofar as they seek to assert a claim against parole officials. But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning it's owns rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting

> the individual citizen from state action is wholly arbitrary or irrational.[3]

Martinez at 281-82 (internal footnote omitted). This Court has emphasized the deference to be accorded state legislatures in fashioning state tort law statutes. The only requirement is that there be a rational relationship between the State's policy interests and the statute. The *Martinez* court wrote that:

> We have no difficulty in accepting California's conclusion that there is a rational relationship between the State's purposes and the statute. In fashioning state policy in a practical and troublesome area like this, the California Legislature could reasonably conclude the judicial review of a parole officer's decisions would inhibit the exercise of discretion. That inhibiting effect could impair the State's ability to implement a parole program designed to promote rehabilitation of inmates as well as security within prison walls by holding out a promise of potential rewards. Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is

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3. To the extent that the conduct at issue here was "wholly arbitrary or irrational," it would implicate notions of *substantive* due process. *See County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

> unconstitutional when applied to defeat a tort claim arising under state law.

Martinez at 282-83 (internal quotations and citations omitted). Here, precisely the same considerations were at issue when the Maine Legislature implemented the immunity provisions contained in Maine's Tort Claims Act. The statement of fact adopted by the Legislature when it implemented the provisions providing discretionary function immunity to governmental employees provides:

> [I]t bears emphasis that the immunities contained in Title 14, Section 8111, are intended to serve important governmental purposes. Government officials are frequently required as part of their jobs to take actions that have serious consequences for the individuals affected. Obvious examples are the actions of law enforcement officers investigating crimes .... If these government officials were faced with the constant possibility of personal liability, the inevitable result would be that they will be hesitant to take necessary enforcement action and the public interest would suffer.

L.D. 2443, Statement of Fact at 15 (113th Legis. 1987), at App. A, pp. 8a-9a.

This Court's oblique reference to the question of whether an immunity provision in a state post deprivation procedure could ever constitute a denial of due process does not assist Petitioners' arguments. In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the court simply observed that the respondents in that case were not arguing that they were

denied due process by virtue of an immunity provision contained in California's tort statute. *County of Sacramento v. Lewis*, 523 U.S. 833, 840 n.4 (1998). The court did not in any way suggest that such an argument would have merit. In fact, the citation to Justice Kennedy's concurring opinion in *Albright v. Oliver*, 510 U.S. 266 (1994), suggests the contrary. In *Albright*, Justice Kennedy wrote:

> The commonsense teaching of *Parratt* is that some questions of property, contract and tort law are best resolved by state legal systems without resort to the federal courts, even when a state actor is the alleged wrongdoer. As we explained in *Parratt*, the contrary approach would almost necessarily result in turning every alleged injury which may have been inflicted by a state official acting under color of law into a violation of the Fourteenth Amendment cognizable under § 1983 . . . . Presumably, under this rationale any party who is involved in *nothing more than an automobile accident* with a state official could allege a constitutional violation under § 1983. Such reasoning would make the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states . . . .

Albright v. Oliver, 510 U.S. 266, 284 (1994) (Kennedy, J., concurring) (emphasis added).

Petitioners' attack on the constitutionality of the immunity provisions of Maine's Tort Claims Act fail for all of the foregoing reasons. Because the decision of Maine's Supreme Court is not in conflict with any other state court

of last resort, or with any prior decision of this Court, there is no occasion to issue a writ of certiorari on the grounds that the immunity provisions of Maine's Tort Claims Act fail to pass constitutional muster. *See* Supreme Court Rule 10.

II. THE STATE COURT CORRECTLY CONCLUDED THAT THE "SHOCKS THE CONSCIENCE" STANDARD APPLIES TO SUBSTANTIVE DUE PROCESS CLAIMS ARISING OUT OF HIGH SPEED OPERATION OF POLICE VEHICLES DURING EMERGENCY RESPONSES.

Petitioners' challenge to that portion of the State court's decision holding that the "shocks the conscience" standard applies to substantive due process claims arising out of the high speed operation of police vehicles during emergency responses fails for two reasons: (1) it ignores the fact that the holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998) applies as a matter of law to all cases where law enforcement personnel operate police vehicles at high speeds in emergency situations, and (2) it is premised on a challenge to the application of a properly stated rule of law. Such challenges rarely constitute the basis for the issuance for a writ of certiorari. Supreme Court Rule 10.

A. *The State Court Correctly Applied The "Shocks The Conscience" Standard In Analyzing Petitioners' Due Process Claims Where Respondent Hall Was Required To Make Split Second Judgments With No Opportunity For Recourse.*

In *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), this Court held that:

> high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under § 1983.

County of Sacramento v. Lewis, 523 U.S. 833, 854 (1998). In reaching that conclusion, the court recognized that emergent law enforcement action is often undertaken "in haste, under pressure, and frequently without the luxury of a second chance." *County of Sacramento* at 853 (internal citation and quotations omitted). The court required that in order for a law enforcement officer operating under such circumstances to be liable under § 1983, the officer must "shock the conscience" as evidenced by an *intent to harm*. *Id.* at 854. Petitioners urge that this Court's decision in *County of Sacramento* is limited to circumstances involving a "high-speed automobile chase aimed at apprehending a suspected offender." Petition at 15. Petitioners further urge that the holding in *County of Sacramento* was limited to the circumstances of that case, petition at 16, and that the mid-level "deliberate indifference" standard adheres in emergency response cases, because, Petitioners say, there is an "opportunity to deliberate". *Id.* Finally, in perhaps the most ironic twist, Petitioners contend that even if the "shocks the

conscience" standard applies here, even though there is no evidence indicating that Respondent Hall intended any harm, the facts are still sufficient to require a trial on that issue. Petition at 17. Petitioners simply misapprehend the holding in *County of Sacramento*.

First, the holding in *County of Sacramento*, although rendered in a case involving a police pursuit, was in no way limited to the precise facts of that case. Rather, the court reiterated its earlier teachings that where police are faced with circumstances "calling for fast action [and] have obligations that tend to tug against each other," and where the police "are supposed to act decisively and to show restraint at the same moment, . . . [making] their decision . . . in haste, under pressure, and frequently without the luxury of a second chance," liability under the Fourteenth Amendment will not lie in the absence of intent to harm for reasons unrelated to legitimate law enforcement purposes. *County of Sacramento* at 853. In reaching its holding, the *County of Sacramento* court likened the law enforcement officer's emergency pursuit to the circumstances facing a prison official in a riot. *Id.* To somehow tease out a distinction between police officers engaged in a high speed chase, from police officers engaged in a high speed emergency response, is inconsistent with the rationale underlying the holding in *County of Sacramento*. Whether engaged in a high speed chase as in *County of Sacramento*, or a high speed emergency response as here, the police are required to make split second decisions based upon instinct.

Here, Hall instinctively believed that something far more sinister was afoot than a six year old child who would not go to bed. The police normally do not receive calls from parents whose children who will not go to bed, particularly six year

old children at 10:00 P.M. She was familiar not only with the location of the call, but also the residents who frequented and resided at that location. She was aware that alcohol and violence were commonplace, having responded only weeks before to the same location to a call involving a violent crime. Furthermore, Hall was made aware that rescue was standing by, meaning to her that there was some sort of personal injury requiring the presence of a rescue unit, but that the rescue unit would not respond until the police advised that the scene was secure. Moreover, Hall's own supervisor was responding the call, and was doing so on an emergency basis.

These facts are the sort of "unforseen circumstances [that] demand an officer's instant judgment." *County of Sacramento* at 853. Notwithstanding Petitioners' argument to the contrary, the "shocks the conscience" standard is as applicable to cases involving emergency responses as it is to cases involving emergency pursuits. Any fair reading of *County of Sacramento* reveals that the holding was intended to apply to all situations where government officials are required to make quick decisions under rapidly evolving circumstances where there are competing considerations. The distinction which Petitioners attempt to make is that, when pursuing a vehicle, the operator of the police vehicle is faced with more split-second decisions than is the operator of a police vehicle when responding to an emergency call.

The distinction is one without a difference. Each operator is driving a motor vehicle in difficult, tense and rapidly evolving circumstances. Whether one situation provides more or less opportunity for "deliberation" than another is immaterial. There are clearly circumstances when an emergency pursuit of a vehicle is arguably unnecessary, and other circumstances where, even if pursuit is necessary, the

officer might not be faced with the vagaries of traffic, pedestrians, etc. (for example, on an isolated stretch of desert highway). And there can be no doubt but that there are circumstances under which an emergency response is more stressful and requires more quick decisions on the part of the law enforcement officer than an emergency pursuit.

This Court chose to avoid such individualized inquires, and established a bright line rule whereby liability under the Fourteenth Amendment will not be fastened upon a police officer for actions taken in response to an emergency, absent subjective intent to harm the victim for purposes unrelated to legitimate law enforcement considerations. *County of Sacramento* at 854. Petitioners' suggestion that Respondent Hall's conduct should be evaluated under the mid-level "deliberate indifference" standard is rejected perforce by the holding in *County of Sacramento*.

B. ***In Order To "Shock The Conscience," There Must Be Evidence That The State Actor Intended To Harm The Victim For Purposes Not Related To Legitimate Law Enforcement Activities.***

In implicit recognition that the "shocks the conscience" standard applies to the facts of this case, Petitioners contend that Respondent Hall's conduct meets that standard. Petition at 17. The problem with Petitioners' argument in this particular is that the phrase "shocks the conscience" as used in substantive due process parlance has a specific meaning: the conduct must have been undertaken for the purpose of harming the victim for reasons not related to legitimate law enforcement activities. *County of Sacramento* at 854. Petitioners use the phrase more generically, suggesting that Hall made poor judgments in treating the call as an

emergency and responding as she did, and that under the circumstances her conduct is shocking to the conscience.

While individuals' particular sensitivities and peculiarities may lead one person's conscience to be shocked by the same set of facts which merely trifles another's, the question is not whether a given individual's conscience (or the collective conscience of a jury) is shocked, but rather whether there is evidence that the actor intended to harm the victim for illegitimate purposes. *Id.* In the absence of such evidence, there is no substantive due process claim as a matter of law. Petitioners' arguments to the contrary are unavailing.

C. *Petitioners' Disagreement With The State Court's Application Of A Properly Stated Rule Of Law Does Not Provide An Appropriate Basis On Which To Issue A Writ Of Certiorari.*

Petitioners argue at length that the facts demonstrate that Hall had an opportunity to deliberate, that she failed to do so, and that her actions were reckless and unjustified. *See* Petition, pp. 17-20. The State court determined that, absent an intent to harm the victims, Petitioners' constitutional claim under the Fourteenth Amendment failed as a matter of law. Appendix A, p. 12 a. Notwithstanding all of the "facts" set forth in the Petition, the State court concluded that no trialworthy issue existed as to whether Hall was making an instantaneous decision with no opportunity for reflection, thus implicating the "shocks the conscience" standard. Disillusioned though Petitioners may be by this finding, it does not provide an appropriate basis upon which to issue the requested writ. *See* Supreme Court Rule 10.

III. EVEN IF A CONSTITUTIONAL VIOLATION EXISTED, RESPONDENT HALL IS ENTITLED TO QUALIFIED IMMUNITY.

Individual defendants in § 1983 actions are protected from liability where the constitutional rights at issue were not clearly established such that a reasonable person in the shoes of the defendant would have known that they existed. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). Although there is some discontinuity in the approaches taken by different courts to determine whether or not a given constitutional right was "clearly established," *see* K. Blum, *Qualified Immunity: A User's Manual*, 26 Ind. L. Rev. 187, 202 (1993), it is clear that generally established constitutional norms do not suffice for demonstrating the existence of a "clearly established" constitutional right. Indeed, in *Anderson v. Creighton*, 483 U.S. 635 (1987), the court wrote that:

> The right to due process of law is quite clearly established by the due process clause, and thus there is a sense in which any action which violates that clause (no matter how unclear it may be that the particular action is in violation) violates a clearly established right. Much the same could be said of any other constitutional or statutory violation. But if the test of "clearly established law" were to be applied at this level of generality, it would bear no relationship to the "objective legal reasonableness" that is the touchstone of *Harlow*. Plaintiffs would be able to convert the rule of qualified immunity that our cases plainly establish into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights . . . . Our cases establish that the

> right the official is alleged to have violated must have been "clearly established" in a more particularized, and hence more relevant, sense: *the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.*

Anderson v. Creighton 483 U.S. 635, 639-40 (1987) (emphasis added).

Petitioners contend that Respondent Hall's actions exceed her statutory authority, *see* petition, p. 21, yet they do not explain how. More importantly, Petitioners' reliance on the facts – as they view them – does not advance their cause. Even if one accepts as true that Hall knew that she was violating a state statute in some particular, that fact would not enter the constitutional calculus. In order to lose the shield of qualified immunity, Respondent Hall would had to have known that her conduct was violating another's *constitutional* right. In light of the holding in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), it is difficult to imagine how a police officer in Respondent Hall's position would have been on notice that her conduct ran afoul of the Fifth and Fourteenth Amendments. In a concurring opinion, Justice Stevens urged that when the constitutional landscape is unclear, such that it is difficult to discern whether a constitutional right has been violated, the qualified immunity analysis may leapfrog the first prong – the question of whether a constitutional right was violated – and proceed directly to the second prong, the question of whether a reasonable person in Respondent's position would have known that her actions violated the right. *County of Sacramento* at 859 (Stevens, J., concurring). This case

presents precisely that occasion. At a minimum, Hall was clearly entitled to qualified immunity, and there is no occasion to review the lower court's determination on certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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